

# Public benefit, private burden? The role of social utility in breach of duty decisions in negligence



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## Introduction

Foreseeability of harm is a necessary requirement to establish a breach of duty in negligence, but it is not a sufficient requirement. It is still necessary to consider what the defendant did (or should have done) in response to the risk he could reasonably foresee.<sup>1</sup> This is an exercise in balancing competing elements.<sup>2</sup> Therefore, one important question will be, what factors go into that side of the balance when considering what the defendant ought to have done in response to the foreseeable risk? How is a court to assess what a reasonable defendant would have done? One factor which has appeared with increasing frequency in judicial pronouncements is the issue of social utility. To what extent, in deciding what a defendant ought to do in response to a reasonably foreseeable risk of injury, is it relevant that the defendant was engaged in a socially useful activity?

That social utility is relevant seems to be almost universally agreed upon.<sup>3</sup> Mullender describes this as the ‘mainstream view’.<sup>4</sup> Indeed, it is a concept which nowadays finds statutory support in section 1 of the Compensation Act 2006 and in section 2 of the Social Action, Responsibility and Heroism Act 2015.<sup>5</sup> The view that social utility is a relevant factor may be *almost* universal, but it is certainly not totally universal. Beever has argued that social utility, in fact, plays no part in negligence decisions.<sup>6</sup> This article will seek to analyse the role of social utility in the law of negligence. While it will conclude that Beever’s position is overly robust, it is true that many of the decisions in which social utility is discussed (or, indeed, merely mentioned) do not rely on the concept for their outcome. In addition, there are significant problems in giving the concept of social utility a measure

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- 1 *Glasgow Corporation v Muir* [1943] AC 448, 456, Lord Macmillan (HL).
  - 2 *Tomlinson v Congleton Borough Council* [2003] UKHL47; [2004] 1 AC 46, 34, Lord Hoffmann (HL). See also *Shine v London Borough of Tower Hamlets* [2006] EWCA Civ 852, 25, Buxton LJ (CA).
  - 3 See for example, S Deakin, A Johnston and B Markesinis, ‘Markesinis and Deakin’s *Tort Law*’ 7th edn (OUP, 2007) 213; R Mulheron, ‘Principles of *Tort Law*’ (CUP, 2016) 354; C Witting, ‘*Street on Torts*’ 14th edn (OUP, 2015) 119; Mullender R ‘Negligence, Breach of Duty, and Circumstantial Pressure’ (2016) 32 PN 105, 117.
  - 4 Mullender, *supra* n 3 at 111.
  - 5 The preponderance of opinion, judicial and academic, seems to be that these statutes do little, if anything, to alter the common law position – see, *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66, 13 (Smith LJ); K Williams, ‘Politics, the media and refining the notion of fault: Section 1 of the Compensation Act 2006’ (2006) 4 JPI Law 347. For one who disagrees with this proposition, at least to some degree, see N Partington, ‘Beyond the “Tomlinson Trap”: Analysing the Effectiveness of Section 1 of the Compensation Act 2006’ (2016) 37 Liverpool LR 33.
  - 6 A Beever, ‘Negligence and Utility’ (2017) 17 OUCLJ 85–109 – ‘the leading cases on the standard of care in negligence do not support the view that utility is a relevant consideration’ at 86.



of coherent content that might afford it much practical value in real cases. Further, and in (partial) agreement with Beever, this article will argue that social utility should not be a factor considered in breach of duty decisions in negligence claims

## What is social utility?

One of the many problems with the concept of social utility is the way in which the term is used with limited (if any) attention to what it actually means. The range of activities which could (plausibly) be considered to possess social utility is extensive and wide ranging.<sup>7</sup> In addition, there is also scope for disagreements as to how much social utility a particular activity carries in a particular situation. These factors can make cases difficult to analyse. Talking of social utility as a single concept may, therefore, neglect some of the nuance. With this in mind I have attempted to classify social utility into four different types. It is not claimed that these categories are watertight, nor that other methodologies could not be used instead. Nor, indeed, is it claimed that this classification captures all possible examples of social utility. It is submitted, however, that it provides a structure within which to analyse the cases.

These four types are:

1. Those situations where the claimant herself is a direct recipient of that social utility. Into this category could be put what we might call the participating claimants. This category would, for example, include a claimant injured while taking part in a 'fun day' activity such as a game as part of some kind of organised event.<sup>8</sup>
2. Those situations where the injured claimant is a mere bystander to the social utility involved in the activity. Echoing a case that will need to be discussed in due course, this category would include a claimant injured by a cricket ball hit out of a cricket ground by a player.<sup>9</sup>
3. Those situations where the claimant is not *directly* benefiting from the activity because they are not participating but could be said to be *indirectly* benefiting because society as a whole benefits from the activity. Into this category might fall the emergency services cases, for example another road user injured by an ambulance or fire appliance responding to an emergency call.<sup>10</sup>
4. Those situations where the claimant is participating as an employee of an employer undertaking a socially useful activity. Clearly, such a claimant could be argued to be receiving a direct benefit from the activity through the payment of wages (and, in some situations at least, higher wages than she might have received had she been engaged in other types of employment<sup>11</sup>) but such situations are potentially made more complicated by the additional layer of obligations that stem from the

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7 From cricket to saving life, via the scouts, it would seem. There is, of course, an additional issue that social utility is, in some senses, an ideological concept. As such it may be given different meanings by different judges at different periods, depending upon their own outlooks and the standards of the time. While views on the social utility of saving life may survive these changes, views on the social utility of, for example, cricket, may not.

8 *Uren*, *supra* n 5.

9 *Bolton v Stone* [1951] AC 850 (HL).

10 *Purdue v Devon Fire and Rescue Service* [2002] EWCA Civ 1538 (CA).

11 *Humphrey v Aegis Defence Services Ltd* [2016] EWCA Civ 11, [2017] 1 WLR 2937 (CA).

employment relationship.<sup>12</sup> Into this category might fall the fire fighter injured while being carried in a fire appliance responding to an emergency call.<sup>13</sup>

## Duty or breach?

Before we begin to look at some of the cases within these categories there is one further preliminary point worthy of consideration. To what extent is this question about duty and to what extent is it about breach of duty? At least in theory it is about both. Issues of social utility are capable of arising at either duty or breach stage. When they arise at duty stage they tend to do so under the third limb of the *Caparo* test,<sup>14</sup> which asks whether the imposition of a duty is fair, just and reasonable.<sup>15</sup> Even though social utility could be a factor in determining whether a duty of care exists in the first place, logically and analytically that is a different process from the balancing exercise which exists in breach cases. It may, however, be a mistake to see duty and breach as if they were always entirely separate questions. Deciding that a duty exists is not, by itself, sufficient to determine the liability question. The scope or content of the duty still needs to be determined, that is to say: is there a duty to guard the claimant against the specific misfortune which befalls him. So, a case like *Tomlinson* (to which we will return) is highly relevant in this context, but can be seen as a decision on duty rather than breach in that it is about the scope of the duty owed by the defendant to the claimant.<sup>16</sup> Further, looking at breach of duty issues can be problematic because breach decisions are always highly fact sensitive as judges are seeking to fit case-specific facts into a broad adjudicative approach. Mullender refers to judges responding to 'circumstantial pressure'.<sup>17</sup> This does not, however, mean that nothing useful can be said about that general approach.

It might be easiest to say that these issues are *primarily* breach issues but that, in determining the relevance of social utility to liability, fully separating breach from duty may not be a productive exercise.

## Type 1 cases

These are, as will be recalled, cases where the claimant is a direct participant in the activity said to carry with it social utility. These are cases where there has been much mention of social utility by judges, certainly in more recent times. Despite that, we might conclude that the outcomes in these cases in fact seem to depend on the interaction of two related conclusions:

1. That the level of foreseeable risk of serious injury was low, meaning that there was limited (if any) obligation on the defendant to protect the claimant from the injury suffered;<sup>18</sup>

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12 Like, for example, the non-delegable duty to safeguard the health and safety of the employee – *Wilson's & Clyde Coal Co v English* [1938] AC 57 (HL).

13 *Watt v Hertfordshire County Council* [1954] 1 WLR 885 (CA).

14 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL). See also the recent Supreme Court decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736 which makes it clear that this issue arises at all only in novel cases that do not fit into an existing category of duty situation.

15 *Caparo*, *supra* n 14 Lord Bridge 617–618.

16 *Tomlinson*, *supra* n 2. Actually, it is arguably not 'about' that either, as the relevant discussion in *Tomlinson* is, arguably, *obiter*, the actual outcome of the case having already been determined on other grounds.

17 Mullender, *supra* n 3 at 105.

18 *Tomlinson*, *supra* n 2; *Blair-Ford v CRS Adventures* [2012] EWHC 2360.

2. That the injury was caused entirely by conduct of the claimant in choosing to take an obvious risk.<sup>19</sup> This might have led to a conclusion that the defendant escaped liability because of the defence of *volenti non fit injuria*. But this is not the analytical route generally used in these cases. Logically, the issue of a defence cannot arise unless and until the defendant has first been found to be in breach of duty.<sup>20</sup> These defendants have not been found to be in breach of duty. Rather the fact that the claimant chose to take an obvious risk is used at the stage of the defendant's foreseeability question. Essentially, it was not reasonably foreseeable to a defendant that a claimant would do something as daft as these claimants did, when doing so exposed them to an obvious risk of injury.

It seems appropriate to start with *Tomlinson* because much of the more recent name-checking of social utility by judges seems to have its origins in part of the speech of Lord Hoffmann in this case.<sup>21</sup> The claimant went to a country park occupied by the defendant. The park contained a lake which had formed in a disused quarry. Despite the presence of 'no swimming' signs the claimant, an adult, dived from a standing position into the shallow water at the edge of the lake. He hit his head on the bottom and suffered catastrophic injuries. Prior to the accident the defendants, following advice from their health and safety advisers, had decided to change the landscape around the shore in order to make it more difficult for people to access the lake. This was despite the fact that the lakeside was used extensively (and safely) by very many visitors to picnic, play on the water's edge and paddle in the shallows. Although the council had determined to do that work it had not been carried out at the time of the accident. The claimant sued the council as occupier. The House of Lords dismissed the claim because of what can be said to be a reason specific to the Occupiers Liability Acts.<sup>22</sup> As such the issue of social utility was not relevant to the decision and anything said about it was, strictly, *obiter*. Such *obiter* statements of the House of Lords, however, clearly carry some weight.<sup>23</sup>

Lord Hoffmann stated that what amounted to reasonable care depended not only on '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'.<sup>24</sup> Lord Hoffmann went on to express concern that the 'harmless recreation of responsible parents and children' may be hindered were a duty imposed on the council to prevent the claimant doing what he did.<sup>25</sup> This, he said, 'would damage the quality of many people's lives'.<sup>26</sup>

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19 *Tomlinson*, *supra* n 2; *Risk v Rose Bruford College* [2013] EWHC 3869.

20 *Smith v Baker & Sons* [1891] AC 325 (HL). Although beyond the scope of this article, the mechanism by which the *volenti* defence operates is not free of controversy: see the discussion in J Goudkamp, *Tort Law Defences* (Hart, 2013) 55–58.

21 *Tomlinson*, *supra* n 2 at 2.

22 *Ibid* at 29 – essentially that the claimant became a trespasser once he ignored the 'no swimming' signs and his claim, therefore fell to be determined under the Occupiers Liability Act 1984. This imposed a duty only in respect of dangers 'due to the state of the premises' or 'to things done or omitted to be done' on the premises. As here there was nothing wrong with the premises *per se* no duty arose on the facts.

23 For example, the whole of the law of liability for pure economic loss is, it could be said, built on *obiter* statements of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] 3 WLR 101.

24 *Tomlinson*, *supra* n 2 at 34.

25 *Ibid* at 46.

26 *Ibid* at 48.

It might be said here that Lord Hoffmann was conflating the social utility of preserving access to generally safe leisure facilities with another issue, that of the autonomy of individuals like the claimant to take risks if they wish to do so. Arguably Lord Hoffmann made more of the autonomy point than he did of the more general social utility point.<sup>27</sup> It is, of course, perfectly possible to argue that there is a social utility in preserving individual autonomy to do daft things. Indeed, it can be said that this is related to the provision of generally safe leisure facilities, because preserving such facilities in a generally safe condition may equally preserve the potential jeopardy to those who choose to use them in a way that exposes them to risk. As such, any social utility in autonomy and any social utility in not restricting access may be seen as complimentary.

So, a couple of things can be said about *Tomlinson*. Firstly, it is not part of the *ratio* of the case that courts must consider social utility. Secondly, it is clear that Lord Hoffmann<sup>28</sup> considered social utility to be of importance in the breach of duty balancing exercise.

Despite that, it could be said that the argument advanced by Lord Hoffmann in *Tomlinson* has caught on, with it being mentioned by a number of judges in subsequent cases.<sup>29</sup> What remains difficult to identify are cases in which the social utility of the defendant's conduct appears to make any difference to the ultimate outcome. What may be most instructive, are cases in which the social utility of the activity was considered to be high, but liability was imposed despite this. Such cases may help indicate what role social utility plays in decision making.

One case that provides an example here is *Uren v Corporate Leisure*.<sup>30</sup> This case has an unusual procedural history. The claimant's claim was initially dismissed at first instance,<sup>31</sup> but that decision was overturned on appeal with the Court of Appeal ordering a retrial.<sup>32</sup> The claimant was successful at that retrial.<sup>33</sup>

The case concerned an RAF serviceman who suffered catastrophic injuries while participating in a game at what was described as a 'health and fun day' organised at his RAF base. The particular game was a relay race which involved the retrieval of plastic objects from a shallow, water-filled inflatable pool. The claimant entered the pool headfirst and, in doing so, struck his head on the base of the pool, resulting in the relevant injuries. At the first trial Field J found for the defendants. In overturning that decision the Court of Appeal found the judge's reasoning (that the level of foreseeable risk was very low) open to doubt. In considering the role of social utility, Smith LJ said:

'I wish to make it plain that, if I had been satisfied that the judge's conclusion as to the low level of risk entailed, I would not have interfered with the way in which he balanced that risk against the social benefits of the activity. I confess that I personally would not have assessed the social value of this game in quite

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27 *Ibid* at 46–47. See also *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] PIQR P1.

28 And, one must assume, Lord Nicholls, who merely expresses agreement, *Tomlinson*, *supra* n 2 at 1.

29 For example, *Scout Association v Barnes* [2010] EWCA Civ 1476, *Uren*, n5, *Cockbill v Riley* [2013] EWHC 656 (QB); *Risk v Rose Bruford College*, *supra* n 19.

30 *Uren*, *supra* n 5.

31 *Uren v Corporate Leisure (UK) Ltd* [2010] EWHC 46 (QB).

32 *Uren*, *supra* n 5.

33 *Uren v Corporate Leisure (UK) Ltd* [2013] EWHC 353 (QB).

such glowing terms as did the judge but I accept that he did not make any error of approach.<sup>34</sup>

While it is clear, therefore, that there was a disagreement as to amount of social utility the activity had, Smith LJ was entirely on board with the idea that that was a concept which a judge could (and, arguably, must<sup>35</sup>) take into account when conducting the breach of duty balancing exercise. The problem arose not in respect of the assessment of social utility but in respect of the level of foreseeable risk against which that was being balanced. Of the other two judges, Pitchford LJ merely expressed agreement.<sup>36</sup> Aikens LJ made no specific mention of social utility, but his judgment is short and he did express agreement with Smith LJ as to both outcome and reasoning.<sup>37</sup> There was, therefore, no dissent in the Court of Appeal that the social utility of the activity was a relevant consideration in the assessment of breach of duty.

At the retrial Foskett J concluded, on the evidence, that the risk of head first entry should have been foreseen (particularly in the context of a race involving a competitive element) and, once that was foreseen ‘alarm bells should have rung’ as to possibility of this going wrong and injury occurring.<sup>38</sup> While it was ‘impossible to put a statistical likelihood’<sup>39</sup> on this, the risk could not be classified as minimal or very small. In such circumstances the risk could not be ignored ‘unless it could be said that there was something in the particular game that made it worth taking the risk’.<sup>40</sup> Having reached that conclusion Foskett J moved on to consider the social utility of the activity. He discussed this in very positive terms<sup>41</sup> as being enjoyable, light-hearted and a positive bonding experience for the participants. Foskett J did, however, make a further point, which was that there is also a social utility in avoiding injury.<sup>42</sup> This was for its own sake (such injuries are life changing for the victim) but also because participation in such events was likely to be threatened if they were not perceived to be reasonably safe. This illustrates an important point. While social utility is often seen as a factor that points away from the imposition of liability, there are elements of social utility that would promote the taking of care. As with much in negligence law the issue is one of balance.

Despite the high level of social utility the judge considered to attach to the activity he concluded that the defendants were in breach of duty because, balancing the degree of foreseeable risk with the social utility of the activity they should have banned head first entry, making it clear that any participant who ignored the ban would be disqualified in order to encourage compliance.<sup>43</sup>

Foskett J went on to disavow the argument often advanced by defendants in these sorts of cases, that a finding of liability would lead to such socially valuable activities being discontinued. The judge did not consider his decision to be a threat to such games

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34 *Uren, supra* n 5 at 69.

35 *Ibid* at 13.

36 *Ibid* at 81.

37 *Ibid* at 74.

38 *Uren, supra* n 33 at 188.

39 *Ibid*.

40 *Ibid*.

41 *Uren, supra* n 33 at 195.

42 *Ibid* at 197.

43 *Ibid* at 207–208.

because the game could have proceeded without liability had head first entry (the most risky element) been banned and playing the game in that manner would not have reduced its social utility at all.<sup>44</sup> Indeed, harking back to an earlier comment of the judge, playing the game in that manner would have enhanced its social utility because it would have provided all the same benefits but would have minimised the risk of injury. It would not, of course, have eliminated the risk of injury. Some risk will always exist in such game playing. But eliminating all risk of injury is not what negligence law requires of defendants and, ultimately, how much risk is too much is a matter for judges.

## Type 2 cases

These are cases where, in contrast to type 1 cases, the claimant is not a participant in the activity but is a mere bystander to it. The case very often cited in relation to the relevance of social utility in these circumstances is *Bolton v Stone*.<sup>45</sup>

The facts of this case are probably well known but, briefly, involved a cricket match being played at a cricket ground. A batsman hit a ball out of the ground whereupon it struck the claimant who was innocently standing in the adjacent, relatively lightly frequented street causing her injury. The evidence was that hitting a ball out of the ground was something that had happened previously but that it was infrequent.<sup>46</sup> The House of Lords found in favour of the defendant. Although often cited as an example of the role of social utility in such cases that interpretation is hard to support on the face of the judgment.<sup>47</sup> None of the speeches in the House of Lords make any reference to social utility. The reasoning for the outcome seems, rather, to be that the risk of injury was so small that the defendants were justified in taking no action in respect of it. The frequency with which *Bolton v Stone* comes up in relation to social utility seems to stem from its 'reinvention' some years later by the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Co ('the Wagon Mound No 2')*.<sup>48</sup> This is not, in itself, a social utility case in the traditional sense. It concerned the careless discharge of a large quantity of oil onto the water in Sydney Harbour; the oil was subsequently ignited, causing damage to the claimant's vessels. As such the activity was a commercial one.<sup>49</sup>

The relevance of that latter case lies in certain comments of Lord Reid (who had, himself, been one of the judges in *Bolton v Stone*). The one sense in which it had been possible to identify a similarity between the two cases was that in both the likelihood of harm was small (in *Wagon Mound No 2* because the likelihood of the particular type of oil igniting when dispersed on water was not high). In contrast to *Bolton v Stone*, however, the claimant vessel owners were successful. Lord Reid reaffirmed that the basis of the decision in *Bolton v Stone* was 'that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it'.<sup>50</sup>

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44 *Ibid* at 211. See also *Royal Opera House Covent Garden v Goldscheider* [2019] EWCA Civ 711; [2019] PIQR P15, 82–83 (Sir Brian Leveson P).

45 *Bolton*, *supra* n 9.

46 *Ibid* at 857.

47 Beever, *supra* n 6 at 86–88.

48 [1967] AC 617 (PC).

49 While it might be argued that commercial activities have social utility because of their contribution to general economic well-being, this would extend the concept too far and, in particular, beyond the kind of activities the cases seem to be talking about.

50 *Supra* n 48 at 642.

The key words here are ‘in the circumstances’, because Lord Reid went on to indicate that it would not always be the case that a defendant was entitled to neglect ‘a risk of such small magnitude’.<sup>51</sup> Rather, the defendant must balance the magnitude of the risk with ‘the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that [the case] would have been decided differently’.<sup>52</sup> What are we to make of these comments of Lord Reid? Clearly the first point of note is that the words ‘social utility’ do not appear. But what seems to be clear is 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. This would imply, contrary to Beever’s view, that there was something more going on here than merely the fact that the risk of injury was too small to warrant any remedial action.<sup>53</sup> Whether or not the facts of *Bolton v Stone* would yield the same outcome nowadays may, of course, be open to question. The idea that the playing of cricket is an activity that can justify ignoring a risk of the level engaged in this case may be an idea that has waned somewhat over time.

### Type 3 cases

These cover a wide range of cases where the activity is considered to be for the benefit of the community as a whole, the injured claimant is a recipient of that benefit by virtue of being a member of that community but the activity is not being performed for (or by) the claimant directly. This category is potentially quite extensive but one major sub-class can be described as ‘emergency services’ cases.

This type includes what is probably the case most cited as authority for the proposition that social utility is a relevant factor in determining breach issues, *Watt v Hertfordshire County Council*.<sup>54</sup> The claimant was a fire fighter injured while on route to an emergency. A woman had become trapped beneath a vehicle. The fire brigade responded by sending a heavy jack transported (unsecured) on the back of a lorry with the claimant and two colleagues also in the back of the lorry with it. As the lorry rushed to the scene of the accident (which was, actually, only a couple of hundred yards from the fire station) the jack moved striking the claimant and injuring his ankle. No vehicle more suited to the safe transportation of the jack was available at that fire station at that time. The claimant’s claim against the fire service (his employer) was lost. The judgments in the Court of Appeal are short, and that of Denning LJ (most often cited as authority for the proposition that social utility is a relevant factor) is particularly so. What he said in that short judgment, however, was 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 [claimant] would succeed’.<sup>55</sup> Morris LJ made no similar reference to the social utility (‘the end to be achieved ...’) but seemed to base his judgment on the fact that this was an emergency and so there was nothing else the defendants could do.<sup>56</sup> Singleton LJ arguably gave a slightly different reasoning. For him the issue seemed to be that risks are inherent

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51 *Ibid.*

52 *Ibid.*

53 Beever, *supra* n 6 at 87.

54 *Supra* n 13.

55 *Ibid* at 838.

56 *Ibid* at 838–839. This is, arguably, a social utility point by implication.



in the nature of life as a firefighter and the risk to which this claimant was exposed did not go beyond the ordinary risk in that role.<sup>57</sup> Having said that Singleton LJ did quote approvingly the comment of Asquith LJ in *Daborn v Bath Tramways Motor Co*, who said that in determining negligence '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'.<sup>58</sup> *Daborn* itself is a factually quite unusual case. In the first instance it arose during wartime and so, arguably, it may be more difficult to extrapolate to peacetime conditions. Secondly, neither of the other two judges expressly endorsed Asquith LJ's comment but placed their judgments on the basis that the claimant had simply done nothing wrong and could not, therefore, be founded to have acted negligently. Thirdly, the use made of social utility in the case was to help an injured claimant to a successful claim because the question being considered was whether or not she had been contributorily negligent.<sup>59</sup> Fourthly, in so far as Asquith LJ was stating a proposition of law, he cited no authority for it.

On the face of it, therefore, *Watt* does appear to provide reasonably strong support for the relevance of social utility in the breach of duty balancing exercise, at least in this category of case. If it is undermined in any way it is, perhaps (as has been pointed out elsewhere<sup>60</sup>) because on its own facts it is not clear that it is correctly decided. As the accident was only a couple of hundred yards from the fire station it is not clear why the firefighters, like Mr Watt, needed to be transported in the lorry with the jack rather than walking to the scene, nor, indeed, why the lorry driver could not have proceeded sufficiently slowly to prevent the movement of the jack without significantly delaying the arrival of help to the awaiting victim. Notwithstanding those doubts, on the premise on which it proceeded, none of the judges expressed any dissent as to the relevance to liability of the 'end to be achieved'. Nor has this reasoning received any significant judicial challenge, with *Watt* being cited in more or less approving terms a number of times subsequently.<sup>61</sup>

One such case, also arising in the context of the work of the emergency services, is *King v Sussex Ambulance Trust*.<sup>62</sup> The claimant was an ambulance man called to take a patient from home to hospital. The call was rated as urgent, but not an emergency. The patient needed to be brought downstairs and the only equipment available to do so was a carry chair. While the claimant and his colleague were carrying the patient downstairs the colleague momentarily loosened his grip causing all the weight of the patient and chair to fall on the claimant, who suffered injury. No negligence appears to have been alleged against the fellow employee for loosening his grip. Instead the claim was brought against the ambulance service based upon the system of work. One element of the claim was that the fire brigade should have been called. The evidence was that this was an option available to ambulance crews but would generally be considered only as a last resort. The patient involved in this transfer was estimated to weigh about 12 stones and so was not excessively heavy in terms of patients generally encountered.<sup>63</sup>

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57 *Ibid* at 838.

58 [1946] 2 All ER 333, 336.

59 Which would, at the time, have been a complete defence, as the circumstances pre-dated the Law Reform (Contributory Negligence) Act 1945 which allowed for the apportionment of liability in cases of contributory negligence.

60 Beaver, *supra* n 6 at 99.

61 For example, *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] ICR 1413 (CA).

62 *Ibid*.

63 *Ibid* at 13.

Unlike some of the other cases looked at, this one could not be disposed of on the basis that the risk of injury was very small. As Hale LJ made clear, a lift of 12 stones between two people, particularly downstairs, gave rise to a clearly foreseeable risk of injury.<sup>64</sup> There was, therefore, an obligation on the part of the ambulance service to do what was reasonable in the circumstances to reduce that risk. In contrast to Singleton LJ in *Watt*, Hale LJ was not attracted to the idea that emergency service workers can legitimately be exposed to greater risks than others merely because ‘occupations in the public service are inherently dangerous’.<sup>65</sup> As she put it, ‘public servants accept the risks which are inherent in their work, but not the risks which the exercise of reasonable care ... could avoid’.<sup>66</sup> Hale LJ went on to ask, ‘what ... is reasonable in this context?’<sup>67</sup> In assessing the relevant ‘context’ Hale LJ cited, without demur, Denning LJ from *Watt* and went on to consider social utility issues as being a relevant part of that context. She noted that the ambulance service owed a duty to the public as well as to their employees and that they did not, unlike a commercial service, have the option of refusing the call.<sup>68</sup> She concluded 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,’<sup>69</sup> going on to note that the activity was ‘of considerable social utility’.<sup>70</sup> She dismissed the claim on the basis that the employers had done all that they reasonably could have done in that context. Echoing the comments of Denning LJ in *Watt*, Hale LJ noted that had this been a firm of furniture removers who had been asked to move heavy furniture downstairs, then unless they could do the job without unacceptable risk then their obligation would have been to decline the job and, if they had not done that, they would have been liable to an employee injured by the materialisation of that risk.<sup>71</sup>

*King*, therefore, seems to be an important case because it accepts that the claim cannot have been decided on the basis that the risk of injury was minimal and, in assessing what the employer could reasonably have done makes specific reference to the social utility of the activity, assesses breach of duty in that context and, indeed, draws a distinction between this activity and a similar one taking place in a commercial (ie non-social utility) context where the outcome would likely be different.

## Type 4 cases

It has been said earlier that the four categories of utility cases are not watertight but overlap. This is most clearly so with type 4 cases: situations where the claimant is participating as an employee of an employer undertaking a socially useful activity. These are not likely to arise in isolation but, rather, where the situation would fall into one or other of the earlier types, most often, perhaps, type 3 cases. Indeed, it can be seen that both *Watt* and *King* are themselves examples of cases that span types 3 and 4. It might, therefore, be asked whether

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64 *Ibid* at 4.

65 *Ibid* at 25.

66 *Ibid*.

67 *Ibid* at 22.

68 *Ibid* at 23.

69 *Ibid*.

70 *Ibid* at 24.

71 *Ibid* at 23 – an example endorsed also by Buxton LJ [40]. Interestingly, in his discussion of this case Beever does not discuss this hypothetical example, *supra* n 6 at 100–103. See also M Fowles, ‘Can we afford to compensate our emergency service workers’ (2002) 5 JLGL 126.

it is useful to give separate consideration to employee cases at all. I would submit that it is because the nature of the employment relationship gives rise to a level of duty which would not arise outside the employment context. For example, employers do, often, bear liability for omissions in circumstances where a non-employer would not.<sup>72</sup> In addition, there is a greater level of statutory intervention in the health and safety of employees than exists more generally.<sup>73</sup> The question which needs to be asked is whether there are any instances where the special nature of the employment relationship limits the degree to which the social utility of the employer's operations are relevant to injury claims brought against it by its employees, who bear the task of executing those socially useful activities. The answer would seem to be 'no'; there seem to be no such indications. In *King* itself there is no suggestion in the words of Hale LJ that the nature of the balancing exercise differs fundamentally because the claimant is an employee as opposed to a member of the public injured by the activity. If there is a difference it lies in the nature of the employment, not in the fact of the employment.

*Humphrey v Aegis Defence Services Ltd*<sup>74</sup> is one of a number of cases where injuries occurred to civilian employees engaged in the post-war reconstruction in Iraq.<sup>75</sup> While once again this was a case whose outcome (the dismissal of the claim) can be explained by a finding that the level of foreseeable risk was insufficiently high, Moore-Bick LJ echoed much of what had gone before in noting the potential significance of the social utility of the activity in determining breach of duty questions.<sup>76</sup>

The reasons why some type 4 cases perhaps *ought* to be treated differently was raised in a speculative fashion in *King* by Buxton LJ. In essence he raised this question – if the activity being provided by Mr King's employers (and by other similar services) are of such high public utility 'why should ... the persons who run the risk on behalf of the public, suffer if the risk eventuates?'<sup>77</sup> To return to Hale LJ's example, why should an employee of a furniture remover (advancing no public utility but rather a private, commercial interest) be able to recover in circumstances where Mr King cannot? Buxton LJ felt unable to go beyond the speculative in *King*. Indeed it is clear that he felt constrained by the line of authority he perceived to stem from *Watt* to find against the claimant.<sup>78</sup> This element of doubt on the part of Buxton LJ (as to whether the outcome in *King* was the fair outcome) underlines the degree to which he seems to have felt the weight of earlier authority.

## Public benefit, private burden?

It is time to pull together a few threads from this review of some of the cases that bear on the issue of social utility in breach of duty decisions. In all of the types of cases identified

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72 *Paris v Stepney Borough Council* [1951] AC 367 (HL). See also *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732 (SC), Lord Toulson, 101.

73 *King*, *supra* n 61, for example, required not merely a consideration of the law of negligence but also of the duties imposed by the Manual Handling Operations Regulations 1992 (although the degree to which this is relevant has reduced since s 69 of the Enterprise and Regulatory Reform Act 2013 removed civil liability for the breach of many health and safety regulations).

74 *Supra* n 11.

75 The first instance decisions of *Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) and *Young v Aegis Defence Systems Ltd* unreported, April 2016 (Middlesbrough County Court) are further examples.

76 *Supra* n 11 at 10.

77 *King*, *supra* n 61 47.

78 *Ibid* at 46.

it is easy to find judges talking about social utility and its relevance to the breach of duty balancing exercise, but it is rather harder to find cases where social utility has made a material difference to the outcome. Many of the cases seem, in fact, to turn on the very low level of foreseeable risk of serious injury, or on the fact that the claimant is solely responsible for the accident (which, as these cases are decided, tends to amount to the same thing, ie there is, in those instances, a very low level of foreseeable risk of serious harm because the defendant could not have reasonably foreseen the claimant behaving in the way he did).

As I have mentioned earlier, for Beever this leads to the conclusion that social utility is not, in fact, a relevant element in the consideration of breach of duty.<sup>79</sup> Is Beever's position sustainable?

Perhaps the first thing to be said is this. In so far as Beever's position requires a conclusion that judges who say they are doing one thing are, in reality (and, it would seem, without realising it) doing something else entirely, then this is problematic. As has been seen there is no shortage of judges who repeat the mantra that social utility is a relevant consideration in the breach of duty assessment. To say that social utility is irrelevant despite the fact that judges say the opposite and, indeed, say that it is an issue to which they may (or must) address their minds is, with respect to Beever, an overly robust conclusion. What is clear is that on the facts of individual cases some of the times when judges remark on the relevance of social utility it turns out to be a factor that is not decisive in that particular case (because the disposal of the case can be achieved without social utility playing a decisive part). That is a conclusion that can be drawn from such disparate cases as *Tomlinson* and *Humphrey*. In both of these cases the decision was based on a low level of foreseeable risk of serious injury such that the balancing exercise in which social utility may play a part was not, in the end, reached in any significant way. Arguably, however, Beever treats foreseeability as too much of an on/off switch. It might, however, be said that there are three very broad levels of foreseeability of harm which are relevant to breach of duty decisions in negligence:

1. At one extreme, cases in which the level of foreseeability of harm is so low that no reasonable defendant is obliged to take any steps to obviate that risk. Into this category (at least on the factual findings of the courts) would seem to fall *Tomlinson* and *Humphrey*. Even though social utility is discussed in these cases it does not drive the outcome. In other words, even if the activity had not been socially useful liability would still not have attached because the level of foreseeable risk was too low.
2. At the other extreme, cases where the foreseeability of serious injury is so high that the social utility of the activity can never be sufficient to justify the risk. Into this category may come a case where, for example, an ambulance responding to an emergency call drives well over the speed limit, past school gates, at home time (to take a rather extreme example). The level of risk to which the driver is exposing the children, their parents and anyone else in the area is sufficiently high that social utility is never likely to make any difference.
3. In the middle there are cases where the level of foreseeable risk is not so small that the defendant is justified in ignoring it. Rather, the level of risk is such that the

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<sup>79</sup> Beever, *supra* n 6 at 109.

defendant must take reasonable steps to remove or reduce that risk but what steps are reasonable will depend on all the circumstances of the case, including the purposes on which the defendant is engaged. Such a situation would seem to be illustrated by *King* and, in particular, by the hypothetical example approved by both Hale LJ and Buxton LJ when they drew a distinction between the facts of that accident (where no liability attached) and the possible facts of a substantially similar accident but involving commercial furniture removers (where liability would attach).<sup>80</sup> What is the material difference between those two cases which gives rise to liability in the one but not the other if not the nature of the activity on which the defendant is engaged, ie issues of social utility?

The conclusion of all this can be summarised in a series of steps.

Firstly, the breach of duty analysis is about a balance between the degree of foreseeable risk and what the defendant should have done in response to that foreseeable risk.

Secondly, this balance requires a court to weigh a number of factors. The first and, in many respects, prominent, factor is the degree of foreseeable risk. This, in turn, involves a consideration not merely of the likelihood of the harm occurring but, also, its severity should it occur.<sup>81</sup>

Thirdly, if that level of foreseeable risk is such that the defendant will be justified in doing nothing in response to that risk, social utility will be irrelevant because the defendant will have no obligation to act regardless of the nature of the activity in which it is involved. Beever offers an alternative scenario when discussing *Bolton v Stone*, which imagines that the defendant, rather than playing cricket, had been throwing stones at rabbits and hit the unfortunate claimant. He concludes that liability would not still have attached. On the premise that the risk of injury was very small this is, of course, correct, but it is correct for the very reason that the foreseeable risk was so small. It does not support a conclusion that social utility is never relevant.<sup>82</sup>

Fourthly, if the level of foreseeable risk is very high social utility will, again, be irrelevant. This is because a defendant cannot be justified in exposing others to such a high level of risk, regardless of the nature of the activity in which it is engaged.

Fifthly, if the level of foreseeable risk lies between these two levels then a more forensic analysis is required as to what a defendant ought to do in response to that risk. If the defendant has done all that the court considers it could reasonably have done in the circumstances then there is no liability. If the defendant has failed to do all that it should have done then it will be found to be in breach of duty.

Sixthly, and crucially, in these situations what the defendant should have done in response to the level of foreseeable risk is not always the same for the same level of risk. It is calibrated by a consideration of the social utility of the defendant's activity and by whether, and if so, to what extent, taking steps to remove the foreseeable risk would hamper the continuance of that activity (and, consequently, would represent a dis-benefit to society, or a section of it). Recall, in *Uren* the level of risk was sufficiently high that the defendant was required to act. How it needed to act was influenced by the factor of social utility

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80 *King* n61, 23 (Hale LJ), 47 (Buxton LJ).

81 *Paris v Stepney Borough Council* n72.

82 Beever, *supra* n 6 at 90. The premise that the foreseeable risk would be very small in such a scenario may be open to challenge, but that was the premise on which Beever presented his example.

but liability was imposed because the steps required to reduce the risk to an ‘acceptable’ level would not have significantly interfered with the carrying on of that activity. More extensive steps, which might have prevented the activity in its entirety, were not required, even though a residual risk of injury remained. These more extensive steps would have been required (even to the extent of preventing the activity) had there been no social utility engaged.

Seventhly, as a consequence of the foregoing, social utility may turn out to be a deciding factor relatively rarely, because many cases will stand or fall on the basis of the high or low level of foreseeable risk, leading to social utility being an insufficient factor to shift the outcome one way or another. The fact that social utility may often not be decisive helps explain the relatively few cases in which it seems to be crucial, but does not, I would argue, support Beever’s conclusion that it is, therefore, irrelevant.<sup>83</sup>

This still leaves open an important question of whether the law is taking the correct approach to the assessment of breach of duty. Should it be the case that the social utility of the defendant’s conduct has any relevance at all in assessing breach of duty? On this issue Mullender and Beever take opposite positions. Mullender answers the question about social utility largely in the affirmative.<sup>84</sup> He concludes that it is important to ensure that the law of negligence does not operate in such a way as to prevent (or discourage) the carrying out of socially useful activities. The underlying premise here is that if such activities are discouraged then the result will be that we will all be the poorer as a consequence of such activities no longer taking place. We are presented with a vision of no village fetes,<sup>85</sup> no character-forming ‘rough and tumble’ games for scouts,<sup>86</sup> and, potentially, no lifesaving rescues by the emergency services.<sup>87</sup> That appears to be the premise of, for example, the Compensation Act 2006 as indicated in debates on the Second Reading of the Bill.<sup>88</sup>

There may, however, be several reasons to question Mullender’s conclusion that social utility ought to play a role in assessing breach of duty.

The first relates to the additional layer of uncertainty that the inclusion of social utility brings to the assessment of breach of duty. Put simply, its inclusion involves judges in making value judgments about the kind of conduct that carries social utility, and assigning to it a level of utility that would make it a useful concept in the breach of duty balancing exercise. This, in turn, is likely to vary from judge to judge and, indeed, may also vary over time. Mullender, himself, seems to recognise this when he says ‘it prompts [judges] to make often very large assumptions about the social significance or value of the activities in which individuals and institutions engage’.<sup>89</sup> These issues receive practical illustration in the *Uren* litigation, where Smith LJ on the one hand, and Field J and Foskett J on the

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83 This is a position that does not seem to have been altered by recent legislative developments. See n 5. These recent statutory interventions do not seem to have changed the weight courts attach to social utility when making liability decisions. For example in *Royal Opera House*, *supra* n 44, McCombe LJ and Bean LJ (in their joint judgment) expressed doubt as to whether the provisions of section 1 of the Compensation Act 2006 altered the position at common law in any way and concluded that, in any event, a social utility argument did not assist the defendants.

84 Mullender, *supra* n 3 at 117–119.

85 *Cole v Davies-Gilbert* [2007] EWCA Civ 396 (CA).

86 *Scout Association*, *supra* n 29.

87 *Watt v Hertfordshire County Council*, *supra* n 13.

88 Hansard, HC 8 June 2006 vol 447 col 419–423.

89 Mullender, *supra* n 3 at 108.

other hand seem to come to quite different conclusions as to the level of social utility to be found in the game organised by the defendant.<sup>90</sup> It might be contended that all breach of duty decisions are, by their very nature, difficult to predict. But, when judges discuss social utility in a way which appears to be heavily value-laden, and do so where the social utility under discussion often does not seem to be determinative, predictability of outcome can be sacrificed even further. Where outcomes are highly uncertain it becomes much more difficult for parties to reach sensible settlements without recourse to litigation which is problematic, especially in the modern approach to dispute resolution in preference to litigation.

The second criticism of Mullender's position relates to the whole premise (a premise that, in many ways, underlies the whole 'compensation culture' debate) that liability will lead to desirable activities being curtailed. The difficulty with this is that the argument is rarely accompanied by any empirical evidence of the claimed impact. Indeed, it seems clear that many of the activities being considered in these cases could very easily have carried on with relatively minor adjustments in order to bring the risk level down to an acceptable level. For example, in *Scout Association v Barnes* a game played in darkness would have lost very little, if any, of its social utility if played with the lights on.<sup>91</sup> This would suggest that it is insufficient for judges merely to consider the social utility of the activity. If this factor is to have any impact at all it is important that judges also consider critically defendants' arguments about the consequences of finding a breach of duty to have occurred.

The third criticism of Mullender's position arises out of one of his own justifications. The use of social utility is, for Mullender, an implicit use of the philosophy of 'welfare consequentialism'. This is the idea that we can 'sacrifice some members of society in pursuit of outcomes that benefit the overwhelming majority of people'.<sup>92</sup> This is, in broad terms, a utilitarian approach. All societies engage in this kind of policy making to some degree. But, Mullender also claims that 'welfare consequentialism is egalitarian in orientation'.<sup>93</sup> This seems to be a major part of its legitimacy for him. This would imply that it treats all members of society on an equal basis. But this is, I would argue, incorrect. Rather than treating all members of society equally it singles out individual members of society (those who have the misfortune of suffering injury as a consequence of the activity in question) and requires them to bear the entirety of the loss on society's behalf. This outcome is the very opposite of egalitarian.

So, as Beever himself has pointed out, there is something of a paradox at work here.<sup>94</sup> If the activity in question is of such social utility that it is (collectively) important to society that the activity should continue, it seems hard to see why it is that the claimant who has the misfortune to be injured in the pursuit of that socially useful activity should, effectively, bear the cost of that loss personally. If it is socially useful for ambulances to be able to transport patients to hospital even in circumstances where doing so gives rise to a clear risk of injury to the ambulance personnel why should the person injured in pursuit of that activity bear the loss, rather than that loss being, somehow, socialised? Similarly, if there is social utility in the playing of cricket, why should the passer by hit by the cricket

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90 *Uren* in the Court of Appeal, *supra* n 5 at 69; *Uren* at the first trial, *supra* n 31 at 59; *Uren* at the retrial, *supra* n 33 at 193–201.

91 *Supra* n 29. See also *English Heritage v Taylor* [2016] EWCA Civ 448; [2016] PIQR P14 (CA).

92 Mullender, *supra* n 3 at 112.

93 *Ibid.*

94 Beever, *supra* n 6 at 103–104.

ball struck out of the ground and injured, bear that loss personally? Should society not bear the losses associated with the activities from which it derives benefit? The simplest way to achieve this within the existing liability system would be to impose liability on defendants in these kind of cases, who could then spread that loss through insurance (or, perhaps, in the case of public services, through taxation).

This was, as already touched upon, an issue on which Buxton LJ mused (inconclusively) in *King*. As he put it, ‘...why should those men of courage, who are the persons who run the risk on behalf of the public, suffer if the risk eventuates?’<sup>95</sup> Clearly in the context of an individual case coming before the Court of Appeal this was not a question Buxton LJ felt himself able to run with much further.

But his concerns are valid, not merely in connection with the emergency services but with the social utility cases in general. In all types of social utility case it is the individual injured claimant who finds himself bearing the loss for the benefit of society. This would seem to be distributively unfair, in the sense of failing to properly balance the distribution of benefits and burdens across society, as well as correctively unfair in the sense that the defendant is permitted to impose unnecessary risk which eventuates in injury. It 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. While this would have the most obvious attraction in the emergency services cases it is unlikely that it would be feasible to limit such a reform to one type of case only. Rather, such a reform would need to apply across the board. For the reasons already seen in the analysis of the cases above, this would be unlikely to change the outcome of all that many cases. Most outcomes would remain the same because of the relatively low level of significance social utility plays in many claims. But where there are cases where the claimant might have succeeded but fails to do so because of the (perceived) need to preserve the defendant’s ability to continue the activity, such claimants, I would submit, should succeed so that the cost of the socially useful activity lies where it should, on society. Those who take the benefits should also bear the burden. It is, I would submit, 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.<sup>96</sup>

## Conclusion

We have seen that there are many different types of social utility discussed by judges, and it is convenient to categorise those cases in order to find a structure for analysis. Contrary to the view of Beever, I would argue that the balance of authority seems to be that social utility is a relevant factor in the breach of duty balancing exercise but, equally, it seems that it may be a decisive factor only relatively rarely.<sup>97</sup> This is because many cases stand and fall

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<sup>95</sup> *King*, *supra* n 61 at 47.

<sup>96</sup> Some of that burden may, of course, be mitigated by the NHS and the social welfare system. This mitigation is, however, unlikely to be more than partial. The social welfare system does not, in general, replace lost income to any significant degree, nor does it do anything to compensate for the more intangible aspects of injury.

<sup>97</sup> While it may be rare, it is still possible. As argued above, the issue of social utility was important (and, perhaps, decisive) in *King*, n 61, and, perhaps, in *Watt*, *supra* n 13. These are both cases where it is difficult to explain the outcome on the basis of the low level of foreseeability of harm alone.



on the basis of the level of foreseeable risk. Nonetheless, situations do appear where social utility is, at the very least, in the mix in relation to liability decisions. So long as judges see it as a relevant factor, and talk of it in those terms, we cannot safely assume it will not be decisive in future cases.

This gives rise to a paradoxical situation whereby the cost of the socially beneficial activity can end up falling on one unfortunate individual, rather than that cost being spread across society as a whole. In circumstances where that does occur it is submitted that that is an unfair outcome.