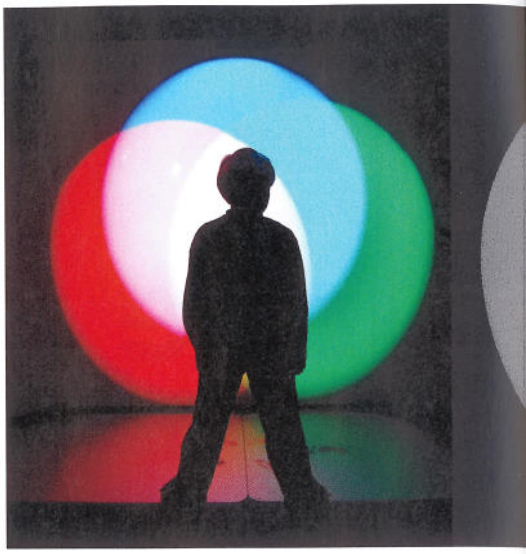
Bump in the night



Insisting children's games have a social value to counter balance any risks involved will reduce the essential elements of challenge and excitement, warn **Kris Lines** and **Jon Heshka**

"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," said Lord Justice Jackson in his report on the costs of civil litigation.

While Jackson LJ's comments reinforce the approach endorsed by the House of Lords in *Tomlinson v Congleton Borough Council* [2003] UKHL 47 and section 1 of the Compensation Act 2006, the challenge for the judiciary has been to balance the needs of compensating injured claimants with defending inherently dangerous activities from a 'compensation culture'.

The Scout Association v Barnes [2010] EWCA Civ 1476 concerned a 13-year-old scout who was injured while playing an indoor game during a meeting at their scout hall. The game (Objects in the dark) was a modification of an approved musical chairs-esque scout game (Grab) where the scouts would run around before grabbing one of the remaining blocks in the centre of the room on a given signal. The modification in this instance was that the game was played in semi-darkness and the signal was the switching off of the remaining lights.

During the game, the claimant collided with a bench in the corner of the hall and banged his head and shoulder. He brought a claim against the Scout Association, alleging the scout leader and his two assistant leaders were negligent for modifying the game. At Birmingham County Court, Judge Worster dismissed the plea for contributory negligence and awarded the claimant £7,000 general damages and £322.40 special damages. This decision was subsequently upheld by the Court of Appeal, Jackson LJ dissenting.

Social benefit

Ultimately, with the facts, duty and cause of the accident agreed, the only issue facing the judiciary was whether the decision to play the game was negligent. While at first glance this might seem straightforward, Jackson LJ in particular recognised the Scout Association also had a strong case:

- The game was supervised closely by three experienced adults who had assessed the risks.
- It had been played multiple times before (and since) without mishap and was appropriate for the participants.
- The game was a modification of an approved game.
- Turning off the lights during the game was an inherent part of the excitement.
- The competitive nature of the scouting game had important social benefits.

In writing for the majority, Ward LJ acknowledged the difficulty in drawing the line between emasculating those responsible for caring for children and enfeebling the children themselves and wondered whether this is an instance of an overprotective nanny state robbing children of fun because they were exposed to some risk in a game.

The judgment effectively came down to a consideration of the social value of the activity. Given that the modification to the game (to play it in the dark) was only to increase the excitement associated with it and was not for any social or educative value, this could not justify the additional foreseeable risks.

Wider implications

While the social utility of an activity has long been a factor in negligence cases (*Watt v Hertfordshire CC* [1954] 2 All ER 368), this judgment represents a potential shift in recent judicial attitudes towards recreational activities. Following *Barnes*, whether the risk associated with a socially desirable activity is acceptable will now be a "question of fact, degree and judgment, which must be decided on an individual basis and not by a broad-brush approach".

It is interesting how the Court of Appeal reached a different conclusion to the similar November 2010 case of *Heatley v The State of New York* (112226, NYLJ 1202476708361). In that case, Janelle Heatley, an 18-year-old student, was injured when she collided with another student during a body awareness exercise where a similar number of participants ran around with their eyes closed.

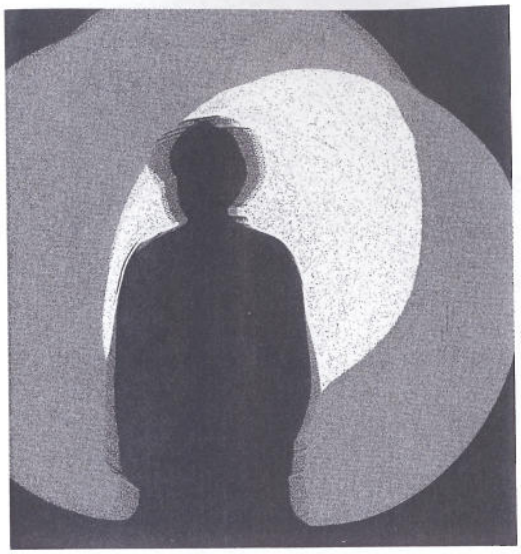
Ultimately, the New York court held against the claimant, ruling that there was a bona fide social utility (trust) to the exercise and that Heatley understood the risks associated with her participation in it.

Given this, the benefit or utility of the exercise in *Barnes* may have been better expressed had the scout leader been more articulate or the court more curious. Exercises such as 'objects in the dark' are not just about excitement but about how we respond under stress and unknown conditions. Indeed, while blindly taking risks should certainly be challenged, some risk is integral to the development and formation of character in today's youth.

Such an approach can be seen in the new policy guidelines on risk-benefit analysis contained in Lord Young's recent *Common Sense, Common Safety* 2010 report; however, ironically this analysis will actually make the bureaucracy associated with voluntary activities worse, not better. Providers will now need to prove that their activity was not just safe, but educationally or socially valuable.

Detrimental effect

What is particularly troubling about *Barnes* is that it condemns a deliberate and considered modification that challenged and excited the scouts. While the absence of light was not an inherent part of the original game, the dangers posed by the darkness are surely obvious to all involved. It is one thing if these additional risks were not managed by the leaders,



or if they were not appropriate to the age and maturity of those present, but to condemn them because of a lack of 'educational value' in the activity seems a very thin line to tread.

Ironically, in analysing Lord Hoffman's judgment in *Tomlinson*, the Court of Appeal actually has more in common with the (discredited) *Tomlinson* Court of Appeal: "Just because there was a foreseeable risk of serious injury did not mean that the defendant was under an oversimplified duty [to turn on the light]." Lord Hoffman further stated that "a duty to protect against obvious or self-inflicted risks only existed where there was no genuine or informed choice or where children were unable to recognise the danger". But was this really the case here?

This judgment has far wider implications than just the scout movement, indeed as the court themselves realised potentially all recreational activities stand to be reassessed by what is effectively a judicial value judgment of the utility of the risks being run. The inherent problem with this approach, however, is that, if strictly applied, many activities such as climbing or skiing may struggle to demonstrate a wider social utility in the conventional sense of the phrase, and the famous words of George Mallory to answer why he wanted to climb Mount Everest – "Because it's there" – would no longer apply.

While the emphasis in *Barnes* on establishing a social utility as a defence against risk is clearly in line with the current governmental policy on providing access to risk in safe, controlled environments, this will have a detrimental effect on some recreational providers. Perhaps the approach should now be 'Common sense, common safety, and the common good…'

Kris Lines is a lecturer at Staffordshire University, and Jon Heshka is an associate professor at Thompson Rivers University in Canada. Contact: kris.lines@staffs.ac.uk and jheshka@tru.ca