COMMON SENSE AND COMMON LAW – WHO DOES THE BALANCING OF SOCIAL UTILITY?

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I.
INTRODUCTION

Hawaii Volcanoes National Park is located on the island of Hawaii, and true to its name, its central attraction is one of the world's most spectacularly active volcanoes, Kilauea. At the end of Chain of Craters Road, visitors may walk out past where it was cut off by a flow to witness a fresh lava flow firsthand and very close up. It's a thrilling and humbling experience to watch and feel 1000-degree liquified rock make its way to the ocean through cracks in the brittle crust just beneath your feet. A smattering of National Park Service rangers wander around reminding viewers to keep to the ill-defined trail, and several warning signs are posted where the road ends and visitors must continue on foot.

The signs are dire enough: "Extreme Danger Beyond This Point!" "Bad Gases," "Red Lava," and "Methane Explosion Risk is *HIGH* Today." But the signs are treated by visitors less as warnings and more as centerpieces of funny photographs to show the folks back home (especially the one about "methane explosion risk"). The rangers and the signs hardly deter hundreds of visitors a day. The tourist and the scientist marvel at witnessing so closely the creation of new land, but the lawyer is instinctively aghast: this is a public space after all, and park management just allows people to walk out day and night, mostly unsupervised, into a fresh lava field surrounded by molten rock and poisonous sulfur dioxide? Do they realize the exposure, the chance of someone being injured and suing? Are they insane?

This essay is not about the dangers that may lurk at Volcanoes National Park, or an analysis of the legal efficacy of the warning signs. The Kilauea example is highlighted simply to demonstrate that even in the age of risk management and litigation some activities are deemed to have such value – whether scientific or esoteric – it is worth the risk of injury and lawsuits to continue them. This essay is about who determines that value.

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II.
TOMLINSON V. CONGLETON BOROUGH COUNCIL

Which brings us to a recent decision from England's highest court, the House of Lords – *Tomlinson v. Congleton Borough Council*.[1] During a holiday outing at a popular public lake, Mr. Tomlinson despite signs forbidding swimming and warning of danger, dove in the shallow water close to the shore and was severely and permanently injured. He sued the park's owners for negligence, asserting they did not take sufficient steps to warn him of the danger or to keep him from diving in the lake. The Lords of Appeals' decision noted that notwithstanding the tragic injuries to Mr. Tomlinson, the landowner was not liable because, among other reasons, to allow him to recover would probably result in cutting off the public's access to the lake, and on the balance, the lake's social value outweighed the need for recovery.

A. The Mere

Brereton Heath Country Park is an 80-acre local government owned and operated public park. The Congleton Borough Council created the park by purchasing an abandoned sand quarry and the surrounding land. The Council installed landscaping and trees, and the area went from a "derelict" unused property to a municipal park used by as many as 160,000 people per year.

A featured attraction of the park is a 14-acre artificial lake known as "the mere" which had been created by flooding the sand quarry. The depth of the mere is from 1-2 feet at the beach to 40 feet at its deepest point. The Council was aware that in hot weather the mere had long been a magnet to the public, which flocked to its sandy beaches. The Council also knew that swimming in the mere could be dangerous. Consequently, from inception the Council forbade swimming and diving, although it permitted other water activities. Aware that visitors were swimming despite the prohibitions, Park management immediately posted signs warning of the danger. For example, "DANGEROUS WATER," and "NO SWIMMING."

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[1] 3 All E.R. 1122 (2003).

After the first year of operation, management posted larger warning signs. With the mere's inviting sandy beaches, however, the signs were generally ignored by visitors. The Council was aware of several accidents in the mere, and a water safety officer reported after a 1990 inspection that visitors continued to swim in the mere due to ease of access. He recommended making the beach areas less accessible by dumping mud on the beaches and planting reeds, and discouraging swimmers by posting notices referring to the muddy bottom and the possibility of contracting waterborne diseases. In 1992, the Council's manager reported that the rangers could not

effectively enforce the no swimming policy, that several near fatal accidents had occurred, and "[w]hilst the rangers are doing all they can to protect the public it is likely to be only a matter of time before someone drowns." Visitors were handed leaflets notifying them of the dangers and life rings and other lifesaving devices were installed.

The Council's leisure officer concurred with the manager's report and recommended that the only way to prevent swimming was to dump mud on the beaches and plant reeds. This plan would cost £5,000 and because of budget constraints, the Council did not implement it immediately. Finally, two years later after another cautionary report from park management stressing "[i]f nothing is done about this and someone dies the Borough Council is likely to be held liable and would have to accept responsibility," the Council allocated the money to landscape the beaches. This work had not yet begun when Tomlinson was injured.

B. The Accident

After finishing work on an unseasonably hot Saturday, 18 year-old John Tomlinson went to the park with friends. After a few hours on the mere's sandy shore, he waded into the two-to-three foot deep water and even though he had seen the warning signs and understood them, and even though he could not see the bottom, dove in headfirst. His dive went deeper than intended and he struck his head on the sandy bottom breaking his neck. He was paralyzed and unable to walk. After the accident the Council fenced off the areas where bathers entered the water, and went forward with its plans to cover the beaches with dirt and plant reeds and trees to make the mere inaccessible to swimmers.

C. The Lawsuit

Tomlinson brought suit against the Council for negligence, asserting it did not take sufficient steps to warn him of the danger or to keep him from entering the mere and diving. Specifically, he alleged that it was not "reasonably safe" to dive in the water, and the Council owed him a duty under the Occupiers' Liability Acts 1957

and 1984 to give him adequate warning and take steps to prevent him from diving.[2]

The trial judge dismissed the lawsuit, finding that the mere was not unusually dangerous, that the risks of diving were obvious, and that the Council owed the plaintiff no duty to keep him from diving. The Appeal Court agreed that the risk in diving was obvious and the plaintiff was – in the words of a judge – "stupid," but in a 2-1 decision reversed, holding the landowner liable because it breached its duty of care by not preventing Tomlinson from entering the water. The Appeal Court reduced Tomlinson's damage award, however, because he was two-thirds responsible for his injuries.

On further appeal by both the Council and Tomlinson,[3] the House of Lords reversed and absolved the Council of liability. The Lords agreed with the trial judge that because Tomlinson ignored warning signs not to enter the mere he was a "trespasser" and was owed a lesser duty of care than a "visitor." The Lords also adopted the trial judge's finding that "the danger and risk of injury from diving in the lake where it was shallow were obvious," and since the mere was not "any more dangerous than any other ordinary stretch of open water in England," Tomlinson's injuries were not due to "the state of the premises." The faulty execution of the dive, not the condition of the mere, was the cause of the injury:

> Mr. Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury.

Tomlinson argued that the mere was dangerous because the Council's inadequate attempts to keep visitors out of the water, thereby "luring people into a deathtrap." The Appeal Court had agreed, opining the mere was an irresistible magnet and the sandy beaches an invitation to swim – "a siren call strong enough to turn stout

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[2] The Occupiers' Liability Act of 1957 sets forth the duties a landowner owes to visitors. The Act of 1984 sets forth the duties owed to trespassers. These acts replaced the common law of premises liability.

[3] The Council appealed from the finding of liability, while Tomlinson appealed from the apportionment of contributory negligence.

men's minds." The Lords rejected this argument since the mere's attractiveness neither enhanced nor diminished its danger; since there was no risk, no duty was owed.[4]

Alternatively, the Lords opined that even if there was a duty owed, the Council fulfilled it by posting warning signs and attempting to keep people out of the water. The Court of Appeal had held that the Council should have done more since the beach was attractive and the swimming ban was clearly not working, but the Lords rejected that reasoning. Not only must the seriousness of possible injury be measured against the likelihood of an accident, but the cost of preventative measures and the "social value" of the activity must be taken into account. The Lords concluded that even though the risk of injury was foreseeable, "it is still in all the circumstances reasonable to do nothing about it." Balancing the destruction of the beaches (by dumping soil and planting reeds) against social value of the park, the Lords held that the value of the park was more important than compensating someone who ignored obvious danger and was catastrophically injured:

> If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may be think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the council did by prohibiting swimming. But the law does not require him to do so.

The Lords recognized that allowing Tomlinson to receive compensation would result in other park visitors being deprived of use of the beach, and considered it unfair that the responsible majority would be punished for the actions of an irresponsible few.

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[4] "The trouble with the island of the sirens was not the state of the premises. It was that the sirens held mariners spellbound until they died of hunger. The beach, give or take a fringe of human bones, was an ordinary mediterranean beach. If Odysseus had gone ashore and accidentally drowned himself having a swim, Penelope would have had no action against the sirens for luring him there with their songs. Likewise in this case, the water was perfectly safe for all normal activities."

> Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive water-side picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, No. . . The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.

The Council should not be "discouraged by the law of tort" from allowing people to have fun and if it means that some people may take reckless and foolish chances and suffer injury, they should be free to do so, "[b]ut that is no reason for imposing a grey and dull safety regime on everyone."

III.
DO JUDGES JUDGE? SHOULD THEY?

In Britain, where the contingency fee has only been allowed for a few years, *Tomlinson* was viewed as a judicial retreat from the trend towards what commentators saw as the American "culture of compensation." As one commentator put it, "John Tomlinson wants to do bone-headed things, they said in their opinion, that's quite all right. But don't come crying to us when you crack your noggin." Another wrote, "[m]any will regard this decision, with its emphasis on personal responsibility, as long overdue and hope that it marks the turning point in our increasingly litigious society."

On this side of the Atlantic the decision garnered very little attention until an op-ed piece by Philip K. Howard entitled *When Judges Won't Judge* in which the author hailed *Tomlinson* as a model for American judges and urged the judiciary to reassert its role as society's gatekeeper against "America's lawsuit culture" and out-of-control tort litigation.[5] "Common law," Howard asserted quoting from *Tomlinson*,

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[5] Philip K. Howard, *When Judges Won't Judge*, The Wall Street Journal (Oct. 22, 2003).

is built upon "common sense," and judges have a duty to balance risk against social value, a duty Howard claims they surrendered starting in the feel-good 1960's.

While he points to "greedy lawyers and a culture that has lost its sense of personal responsibility," Howard stakes the blame for the litigious society in which we seem to live squarely on the judiciary, the "chicken that laid those eggs." It was the judges who quit judging – because of white male guilt – that started this mess and he asserts they should clean it up by emulating the Law Lords of Britain. We need activist judges, Howard argues, who decide "who can sue for what" and take into account public rights not just the claims of the plaintiff and defendant. Howard's argument, of course, is an oversimplification of a very complex issue, but let's briefly address some of his points.

First, Howard paints the *Tomlinson* decision with too broad a brush. The Law Lords accomplished in that case no more than they and American appellate judges do all the time – determining whether a tort duty exists. If a Westlaw search can be believed[6] a majority of states, like *Tomlinson*, explicitly require the balancing of risk with social utility when determining whether a duty exists. Indeed, Lord Hobhouse's *Tomlinson* opinion was inspired in part by a case from the Illinois Supreme Court, *Bucheleres v. Chicago Park District,*[7] which he used to support his conclusion that "[t]he pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen."

The facts of *Bucheleres* are very similar to *Tomlinson*: the plaintiff dove into Lake Michigan off a government-owned seawall, striking his head. His lawsuit alleged the Park District failed to adequately warn him of the danger. The Illinois Supreme Court rejected the claim, holding that diving into the lake without first ascertaining its depth was obviously dangerous, and the Park District had no duty to warn of such dangers. The court also held that on the balance, to permit recovery would result in the public losing access to the lake:

> The social utility of our lakefront areas is significant and the desirability of keeping them open to the public is an important concern in balancing the factors used

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[6] Check it out: search either Westlaw or Lexis for "'social utility" /20 duty."

[7] 655 N.E.2d 826 (Ill.1996).

> in the analysis of duty . . . To require the Park District to take [preventative] steps, we believe, would create a practical and financial burden of considerable magnitude.[8]

At least some American appellate judges, it appears, are doing a bang-up job of standing sentry at the utilitarian gates. Score one for the Yanks!

But let us assume *Bucheleres* is the exception and not the norm. If judges get "active" as Howard suggests, what can they accomplish? Even judges must follow the rules. They are not free to simply look at their docket and dismiss any case they feel may negatively impact the greater good. The modern discovery rules allow a case, once filed, and no matter how seemingly unmeritorious factually, to be drawn out while the facts are discovered. Besides, does it do any good if only appellate judges are gatekeeping as in *Tomlinson* and *Bucheleres*? Down in the trenches of trial courts, judges are bound by precedent and procedure and may be reluctant to go out on the limb and risk reversal.

Howard bails out at the end when he attempts to limit the reach of his call for activism and asserts that "[j]udicial activism has a bad name. It's one thing for judges to impose affirmative legislative mandates, like forced busing, but far more disruptive for judges to sit on their hands and let private litigants sue for the moon." Judicial activism has a bad name for a reason, however. Judges, as unelected officials (at least initially in most states) are not the best actors to intuit the will of the people in a democratic society and to determine what activities have social value and what activities do not. It also would be asking a lot of our judges to have them be activists on their personal injury docket, but restrained in their other cases; once the genie is let out of the judicial activism bottle it seems like it would be hard to get back in.

IV.
CONCLUSION

Finally, we return to Kilauea and our excursion into the lava fields of Hawaii. How long might it be before an injured visitor brings a suit and the Park responds like the Congleton Borough Council and figuratively dumps mud on the beach?

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[8] *Id.* at 836-37.

There is no doubt that a strong and competent trial bench can limit personal injury lawsuits. However, as long as the law schools keep pumping out lawyers, and the tort system is seen as a means for windfall, nothing will prevent people from suing – people sue not only to be compensated, but because there are willing attorneys to facilitate the lawsuit. Why? To paraphrase Willie Sutton because "that's where the money is." Open any city's Yellow Pages under "Attorneys-Personal Injury" to get a flavor of what lawyers are selling to potential clients. Justice? Not necessarily. And the list of potential sources of injuries seems endless: skateboard parks, fast food, McDonald's coffee, handguns, hula skirts,[9] dragees,[10] and even avocados.[11]

. . . cigarette, anyone?

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[9] *See* Woman Sues After Hula Skirt Bursts Into Flames <http://www.bayarea.com /mld/mercurynews/news/7504477.htm> (plaintiff alleged taffia hula skirt "burst into flames at a tiki party").

[10] "Dragees" are those little silver balls on holiday cookies. A Napa, California lawyer is suing to take the cookie decorations off shelves. *See* <http://sfgate.com/cgi-bin/article. cgi?f=/c/a/2003/12/23/MNGS03SUEM1.DTL>.

[11] A chef in Perthshire England, is suing his employer for £25,000 after he injured himself while cutting an avocado, claiming the employer did not warn him of the dangers of slicing an unripe fruit.