Tomlinson v. Congleton Borough Council and Another

House of Lords HL
Ward, Sedley and Longmore LJJ Lord Nicholls of Birkenhead, Lord Hoffmann, Lord
Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote

WARD LJ
1 This appeal concerns an accident with very severe consequences which happened on 6 May 1995 to the plaintiff, John Tomlinson. He was 18 years old at the time and he was one of many hundreds of people who regularly went to Brereton Heath Park near Congleton in Cheshire. The park was owned and occupied by the borough council (the first defendant) managed for them by the county council (the second defendant). They have resolved their initial differences and now defend jointly as occupiers.
2 The centrepiece of the park is a lake. It is not a natural mere but a disused quarry, about 40 foot deep at its deepest point towards which the shore shelves at varying degrees. It was an extremely popular venue where yachting, sub-aqua diving and other regulated activities were permitted, but swimming and diving were not. The prohibition was made clear by notices reading "DANGEROUS WATER: NO SWIMMING", which had little or no effect. A succession of disclosed internal documents, to which I shall have to refer in detail later, shows the local authorities to have been fully alive to this and the need to do what they could about it. A scheme was in fact developed to plant the shores from which people swam with vegetation which would make them inaccessible, but by the date of the accident the budgetary bids for the relatively modest cost of doing this work had been repeatedly turned down. Since the accident, planting has been carried out and has proved effective.
3 6 May 1995 was the Saturday of a bank holiday weekend and a hot day. The plaintiff went there after work with some friends in the early afternoon. He went in and out of the water, like others, to cool off, diving or plunging within his depth. At one point of the afternoon Mr Tomlinson dived from a standing position in water which came no higher than his mid-thigh. Somehow--it has never become clear how, but the judge saw no reason to attribute it to a submerged object--Mr Tomlinson struck his head with sufficient force to drive his fifth cervical vertebra into the spinal canal. The injury paralysed him from the neck down, and in the time since he has made only a limited recovery of the use of his hands and arms.
4 His case against the local authorities is that as occupiers it was their breach of their duty of care towards him which was the cause of his accident. Their case is that the risk of danger was, as he knew, an obvious one and he willingly accepted it.
5 Jack J, who tried the issue of liability in Manchester on 21 March 2001, set out the history in careful detail. At the end of it he said:
"I conclude this section by noting that there was nothing about the mere at Brereton Heath which made it any more dangerous than any other ordinary stretch of open water in England. Swimming and diving carry their own risks. So, if the mere at Brereton was to be described as a danger, it was only because it attracted swimming and diving, which activities carry a risk."
6 As to the occurrence of the accident, the judge found:

"Mr Tomlinson waded into the water until it was a little above his knees, probably at or no deeper than mid-thigh level. He could not see the ***50** bottom. He then threw himself forward in a dive or plunge. He intended it to be a shallow dive. But it went wrong. He went deeper than he intended. His head struck the sandy bottom ... I am satisfied that he did not dive towards the shore, and I am satisfied that he did not jump into the air and then jack-knife to do a vertical dive ... Mr Tomlinson said that he was a strong swimmer. It appeared from his evidence that he did not have much experience of diving. Somehow on this occasion he just got it wrong, with tragic results. He might have been saved by his arms, had they been outstretched in from of him, but somehow he was not."

7 The judge's findings, which have not been challenged on this appeal, that the plaintiff had seen and ignored the signs meant that when he entered the water, he ceased to be at the park for the purposes for which he was invited and permitted by the defendants to be there. He accordingly ceased to be a visitor and became a trespasser. As such, he was owed not the common duty of care under the Occupiers' Liability Act 1957 but the duty contained in section 1 of the Occupiers' Liability Act 1984. That Act, replacing the accretion of common law rules, provides by section 1:

"1. *Duty of occupier to persons other than his visitors.* (1) The rules enacted by this section shall have effect, in place of the rules of the common law, to determine--(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and (b) if so, what that duty is.

"(2) For the purposes of this section, the persons who are to be treated respectively as an occupier of any premises (which, for those purposes, include any fixed or movable structure) and as his visitors are--(a) any person who owes in relation to the premises the duty referred to in section 2 of the Occupiers' Liability Act 1957 (the common duty of care), and (b) those who are his visitors for the purposes of that duty.

"(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if--(a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

"(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

"(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

"(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a ***51** risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care

to another)."
8 Jack J found against the plaintiff. His essential conclusions were these:
"27. In his cross-examination Mr Tomlinson accepted that he knew that he should not dive in shallow water where he might hit the bottom. He accepted that he could not see the lake bed, that he assumed that it was sufficiently deep to dive without hitting the bed, and that he should have checked. These were important answers but in reality they were a necessary acceptance of the obvious. In short, Mr Tomlinson took a risk.
"28. A duty arises by reason of section 1(3) of the 1984 Act if three matters are satisfied. First, there must be a risk of which the occupier was aware (or had reasonable grounds to believe existed). The risk here was not the risk of drowning through for example, exhaustion or cramp, but the risk of injury through diving--which might include drowning consequent on a direct injury. The defendants were aware of this danger: I refer in particular to the two head injuries in 1992. The second is satisfied if the occupier knows that the plaintiff may come into the vicinity of the danger. That was the case here. The third is that, in all the circumstances of the case, the risk was one against which the occupier may reasonably be expected to offer the plaintiff some protection. It was submitted on behalf of the defendants that this was not satisfied. Where there is a duty, section 1(4) provides that it is to take such steps as are reasonable in all the circumstances to give warning of the danger concerned or to discourage persons from incurring that risk. In the circumstances of this case at least, consideration of the third requirement under section 1(3) and consideration of the duty under section 1(4) cover much the same ground.
"29. In my view the danger and risk of injury from diving in the lake where it was shallow were obvious. That is my conclusion on the evidence in the case. It concurs with the conclusions reached in the cases which I have cited. On the basis of Darby v National Trust [2001] PIQR P372 that is really the end of the matter. For the essence of that case--a case decided under the Occupiers' Liability Act 1957-- and others is, in my view, that an occupier is not under a duty to warn against a risk which is obvious. But, if I take a step further and say that the history showed some protection was required because of the attractions of the lake, then I would hold that the signs were reasonable and sufficient steps to give warning of the danger and to discourage persons from incurring the risk. It can be said that despite the signs people continued to go into the water. That was a decision which they were free to make: they could choose to accept the risk. I do not think that the defendants' legal duty to the plaintiff in the circumstances required them to take the extreme measures which were completed after the accident involving the fencing off of the areas where people went into the water and the planting of the beaches with trees. I should add that I reject the submission that by putting the warning signs on the beaches the defendants were inviting swimming elsewhere. That is ***52*** lacking in realism. If the water was dangerous off the beaches, it was plainly at least as dangerous elsewhere.
"30. I also consider that an alternative route to the answer in this case is under section 1(6). For, by diving as he did, Mr Tomlinson willingly accepted the risk involved ...
"34. Finally, if I am wrong and the defendants were in breach of duty to the plaintiff, the question of contributory negligence would arise. In my view, on the facts and circumstances which I have set out it would be appropriate to apportion the responsibility for the injury as to one third to the defendants and two thirds to the plaintiff. I do so on

the basis that Mr Tomlinson dived in very shallow water, knowing of the notices warning of the danger."

9 Mr Braithwaite, having taken this court through the authorities which Jack J had considered in detail, and having drawn attention to the way the dangers had been considered by the authorities, submitted that if Jack J's decision was right, an occupier's liability is discharged simply by the display of notices even where the locus is a public resort, where it is perceptible that the notices do not have the required effect, and where alternative measures which will be effective are manifest but are not undertaken. The duty, he submits, was to do what was practicable to prevent the occurrence of accidents, not merely to warn people that they might occur. As to contributory negligence, he submits that no more than one third of the blame can properly rest upon the plaintiff.

10 Mr Machell submits that in the circumstances found by the judge the defendants owed the plaintiff no duty; or that if they did, it was discharged by the display of warning notices. He relies in particular upon the judge's finding that there was nothing about this lake which made it more dangerous than any other stretch of open water, and that the risk of injury from diving where the lake was shallow was obvious. This was not a case where an unpredictable declivity in the lake bed had caused a child to lose its footing and drown (which, Mr Machell accepted, would have attracted liability): this was a case of an adult choosing to dive into shallow water.

11 Mr Braithwaite meets this argument initially by submitting that the judge has adopted two erroneous premises in reaching his conclusion. He has expressly treated the lake as no more dangerous than any other ordinary open stretch of water, when the chief reason for keeping swimmers out was precisely that it was treacherous underfoot. And he has taken the risk to be not the generalised risk that anybody entering the water might, albeit in a possibly unpredictable way, have a nasty accident, but as the specific risk of injury through diving. If so, he argues, the conclusion must be arrived at afresh by this court on a correct factual and legal basis.

12 Like the judge, we have reviewed various authorities. I must deal with them, albeit shortly. The first is Staples v West Dorset District Council (1995) 93 LGR 536. There the plaintiff was crouching on a plainly visible dark layer of the algae-covered slope of the harbour wall to which the public had access as a promenade. He slipped and suffered serious injury. His claim was brought under the Occupiers' Liability Act 1957 and he contended that the council ought to have erected a sign warning that the Cobb was slippery particularly when wet. Kennedy LJ with whom the other members of the court agreed held, at p 541: ***53***

"It is, in my judgment, of significance that the duty is a duty owed by the occupier to the individual visitor, so that it can only be said that there was a duty to warn if without a warning the visitor in question would have been unaware of the nature and extent of the risk. As the statute makes clear, there may be circumstances in which even an explicit warning will not absolve the occupier from liability (see section 4(a) above); but if the danger is obvious, the visitor is able to appreciate it, he is not under any kind of pressure and is free to do what is necessary for his own safety, then no warning is required."

One should, however, not pass from the judgment without noting Kennedy LJ's further comment, at p 544:

"Of course, after the accident the position was different. The district council then knew that a visitor had slipped off the edge into the sea, and, as responsible occupiers, they had

to do what they could to prevent a recurrence, so they posted warning notices. The fact that they took that action after the accident does not enable me to draw the inference that, in order to discharge the common duty of care to the plaintiff, they should have done so before the accident occurred."

13 Whyte v Redland Aggregates Ltd (unreported) 27 November 1997; Court of Appeal (Civil Division) Transcript No 2034 of 1997, is a decision of this court. The plaintiff hit his head when diving into the water in a disused gravel pit owned by the defendants. Again it was a case on the common duty of care under the 1957 Act. The plaintiff's complaints were that the occupiers had failed to find out about the uneven state of the bottom of the pit and had failed to give proper warnings as to the danger. There had been no previous accidents. Hirst LJ dismissed the appeal after an analysis of the facts. Henry LJ agreed but added, at pp 21-22:

"In my judgment, the occupier of land containing or bordered by the river, the seashore, the pond or the gravel pit, does not have to warn of uneven surfaces below the water. Such surfaces are by their nature quite likely to be uneven. Diving where you cannot see the bottom clearly enough to know that it is safe to dive is dangerous unless you have made sure, by reconnaissance or otherwise, that the diving is safe i e that there is adequate depth at the place where you choose to dive. In those circumstances, the dangers of there being an uneven surface in an area where you cannot plainly see the bottom are too plain to require a specific warning and, accordingly, there is no such duty to warn ..."

Harman J added pungently, at p 22: 'There is far too much open water in this island where riparian owners are private citizens for a duty of such a wide general nature to be easily imposed by the law."

14 Ratcliff v McConnell [1999] 1 WLR 670 concerned an inebriated student ignoring all clear warnings climbing over a locked gate and diving more steeply into the shallow end of the pool than he intended. Giving a judgment with which the other members of the court agreed Stuart-Smith LJ said, at p 681:

"Even if the defendants knew or had reasonable grounds to believe that students might defy the prohibition on use of the pool and climb over the ***54** not insignificant barrier of the wall or gate, it does not seem to me that they were under any duty to warn the plaintiff against diving into too shallow water, a risk of which any adult would be aware and which the plaintiff, as one would expect, admitted that he was aware. Had there been some hidden obstruction in the form of an extraneous object in the pool or a dangerous spike, of which the defendants were aware, the position might have been different."

Stuart-Smith LJ added two other pertinent comments. First he said, at p 680: "it is important to identify the risk or danger concerned since the occupier had to have knowledge of it, or reasonable grounds to believe it exists: section 1(3)(a)."He said, at p 683:

"The duty, if any, is owed to the individual trespasser, though he may be a member of a class that the occupier knows or has reasonable grounds to believe is in the vicinity of the danger. But the nature of and extent of what it is reasonable to expect of the occupier varies greatly depending on whether the trespasser is very young or very old and so may not appreciate the nature of the danger which is or ought to be apparent to an adult."

15 Bartrum v Hepworth Minerals and Chemicals Ltd (unreported) 29 October 1999 is an decision of Turner J. The plaintiff dived from a ledge on a cliff and struck his head on the bottom of an old quarry. There was a history of swimming accidents and signs warning

against swimming were being ignored. Turner J held that the danger of not diving far enough out from the cliff to enter the deep water was so obvious to any adult that it was not reasonably to be expected of the defendants that they would offer any protection. Even if there was a duty, a sign warning "No Swimming" was: "authoritative for the proposition that people were not expected to swim in the lake, whether they entered it by walking or wading, or by jumping or diving; the greater must it seems to me include the less."

16 The latest swimming case is Darby v National Trust [2001] PIQR P372, decided by the Court of Appeal on 29 January 2001. The claim was brought under the Occupiers' Liability Act 1957. There were no warning signs. A little unusually leading counsel and junior counsel for the claimant put forward different propositions. Leading counsel, accepting the difficulty that the risk of death by drowning was foreseeable, submitted that the warning should have included a warning against the possibility of contracting Weil's disease. Junior counsel submitted there was no proper correlation between the risk of swimming in the sea and of swimming in that particular pond. The Court of Appeal did not agree with him. May LJ said, at para 27:

"It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs. In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased."

17 ***55*** When giving permission to appeal Henry LJ drew attention to some obiter comments of Simon Brown LJ in Scott v Associated British Ports (unreported) 22 November 2000; Court of Appeal (Civil Division) Transcript No 2062 of 2000, para 20, to the effect that:

"let us postulate (contrary to the facts) that the defendants here had known full well that dozens of youngsters in the 13-15 age group routinely surfed on their rails in the manner of these appellants, and that a simple fence would have been wholly effective in eliminating this practice. Could it really then be said that they were under no duty to erect such a fence; or, indeed, that a youth who came to be injured whilst surfing had accepted the risk and therefore was owed no duty of care? I hardly think so. For my part, indeed, I would recognise that on certain facts a comparable duty would be owed by occupiers to trespassers who they know are consciously imperilling themselves on their land to that owed by police or prison officers to those known to be of suicidal tendency in their care: see Reeves v Comr of Police of the Metropolis [2000] 1 AC 360. All that, however, is for another day and in another case."

Mr Braithwaite submits that today is the day and this is the case.

18 Mr Braithwaite did rely also on Jebson v Ministry of Defence [2000] 1 WLR 2055 but I do not find the authority helpful as it concerns a duty of care as carriers to passengers being carried in an army lorry. The case is, however, convenient for its citation of a passage in the speech of Lord Steyn in Jolley v Sutton London Borough Council [2000] 1 WLR 1082, 1089:

"Two general propositions are, however, appropriate. First, in this corner of the law the results of decided cases are inevitably very fact-sensitive. Both counsel nevertheless at

times invited your Lordships to compare the facts of the present case with the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilising influence in our legal system. But, comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz, to identify the relevant rule to apply to the facts as found."
I respectfully agree.
19 In that search for principle, I have found it useful to trace the development of the law. The extreme position was taken by Robert Addie & Sons (Colleries) Ltd v Dumbreck [1929] AC 358 which established, at p 365, the rule that an occupier was only liable to a trespasser if he did "some act ... with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser". The harshness of that rule was ameliorated by Herrington v British Railways Board [1972] AC 877 which discarded the test laid down in the Addie case and substituted a test, variously expressed, but usually summed up as the test of "common humanity". That prompted the Law Commission's inquiries and their Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (Law Com No 75) was presented in March 1976. The Law Commission proposed steering a path between extending the common duty of care to trespassers and treating trespassing as an activity to be undertaken at the trespasser's risk with there being no duty on the occupier to make his land safe for persons whom the occupier did not ***56*** desire to be present on his land at all. The result was the Occupiers' Liability Act 1984, the terms of which I have already recited.
20 Since the Act defines when an occupier of premises owes a duty to another, and if so what the standard of care is, it is in my view essential to use the Act as a template for judgment in each and every case. I do not wish to suggest that the decisions in the cases I have recited are wrong but I have found it useful to warn myself that a finding that a risk was obvious is a statement of a conclusion, not the application of a principle. For the principle one must look to the Act. It is a staged process.
21 The first stage under section 1(1) is to identify the risk and the danger. The risk is expressed to be to persons other than visitors suffering injury on the premises by reason of any danger due to the state of the premises (or to things done or omitted to be done on them). In this case there was a risk of injury being suffered by anyone entering the water because of the dangers due to the state of the premises, the premises being constituted by the configuration and contents of this pond created as it was from a disused sand-extraction pit. There was a risk of injury through drowning because of the dangers, among others, of the effect of cold water, being caught in weed, being stuck in the mud or plunging unexpectedly into deep water. There was the risk of injury through diving because of the dangers of diving too steeply in shallow water or into an obstruction. There may have been risks of other injury from other dangers, e g Weil's disease. These risks of injury arose as soon as one entered the water because one did not know what danger lurked, or where it lay hidden. The exact nature of the hazard may not much matter in the particular circumstances of this case.
22 The next stage is to determine whether or not a duty was owed by the occupier. That question depends solely upon whether the three criteria of section 1(3) are satisfied.
23 The first is whether the occupier was aware of the danger. Here that is beyond question. But a few of the records will suffice to indicate the extent of the defendants'

knowledge. The Brereton Heath Management Advisory Group was established in January 1983. At the end of its first year the minutes of 21 November 1983 record that: "The risk of a fatality to swimmers was stressed and agreed by all." A water safety site visit of 11 May 1990 recorded:

"Many instances of swimming during hot spells. During such times up to 2,000 people are present with as many as 100 in the water ... Extensive 'beach' areas are popular with families ... Not unnaturally many will venture into the water for a swim.

"Hazards ... (iii) Long history of swimming activity here (a 'known' spot for swimming)."

An accident was recorded on 19 May 1992 when a man dived into the lake and "hit head on something". The following week a person was pulled unconscious from the lake and had to be resuscitated. The management committee reported on 9 June 1992:

"The lake acts as a magnet to the public and has become heavily used for swimming in spite of a no swimming policy due to safety considerations. As a result of the general flaunting (sic) of the policy [to ban swimming] there have been a number of near fatalities in the lake ***57** with three incidents requiring hospital treatment in the week around Whitsun. Whilst the rangers are doing all they can to protect the public it is likely to be only a matter of time before someone drowns."

24 On 23 July 1992 the leisure services department wrote:

"To provide a facility that is open to the public and which contains beach and water areas is, in my view, an open invitation and temptation to swim and engage in other waters-edge activities despite the cautionary note that is struck by deterrent notices etc, and in that type of situation accidents become inevitable."

The Cheshire Water Safety Committee meeting on 5 October 1993 noted that: "The site has a history of near drownings." In a resolution put to the borough council on 21 November 1999 it was noted that: "We have on average three or four near drownings every year and it is only a matter of time before someone dies." The plaintiff suffered his injuries six months later.

25 The second criterion to establish whether a duty is owed is provided by section 1(3)(b), namely that the occupier knows or has reasonable grounds to believe that the other person is in the vicinity of the danger concerned. Again this has not been in dispute. The minutes I have cited establish that and there is more to like effect. It is quite clear that the park was a very popular venue and despite all efforts to impose the ban on swimming, it was known to the defendants that many entered the water and were in the vicinity of the dangers concerned.

26 The third, and in this case crucial, requirement laid down by section 1(3)(c) is whether the risk was one against which, in all the circumstances of the case, the occupiers might reasonably be expected to offer the trespasser some protection. Analysing that, the protection is against any such risk as is referred to in section 1(1), the risk, that is, of the trespasser suffering injury by reason of the dangers lurking in the mere. The protection we are looking for is "*some* protection". The question is whether *some* protection might reasonably be expected to be offered. The question is *not* whether *reasonable* protection is to be expected. To frame the question that way is to fail to distinguish between the establishing of the duty under section 1(3) and the standard of care necessary to satisfy the duty which is provided by section 1(4). These are distinct and separate requirements and I am concerned that the judge may have failed to keep them separate and distinct when he said:

"In the circumstances of this case at least, consideration of the third requirement under section 1(3) and the consideration of the duty under section 1(4) cover much the same ground. In my view the danger and risk of injury from diving in the lake where it was shallow were obvious ... an occupier is not under a duty to warn against a risk which is obvious."

27 There is a further important phrase in section 1(3)(c): the question is whether some protection might reasonably be expected to be offered "in all the circumstances of the case". This serves to emphasise Lord Steyn's observation in Jolley v Sutton London Borough Council [2000] 1 WLR 1082, 1089, that cases are "inevitably very fact-sensitive".

28 The circumstances of this case are that Brereton Heath Park has for years been a well known and well used leisure attraction. The minutes show ***58*** that in 1992 160,000 people used the park during the year. During a hot spell 2,000 people were present with as many as 100 in the water. The lake was a magnet to the public and the sandy beaches an invitation to swim. Of major concern to the occupiers was the unauthorised use of the lake and the increasing possibility of an accident. As minutes of the advisory group held as long ago as 17 March 1988 record:

"On busy days the overwhelming numbers make it impossible to control this use (swimming and the use of rubber boats) on the lake, and it is difficult to see how the situation can change unless the whole concept of managing the park and the lake is revised."

29 In discharge of the common duty of care owed to the visitors under the Occupiers' Liability Act 1957, the authorities placed prominently signs which forbade swimming and warned of the "dangerous water". In entering the water against that prohibition, the plaintiff made himself a trespasser to whom a different duty was now owed. If the words on the notice board "NO SWIMMING " qualified the use he was permitted to make of the facility, do the other words above or below that, "DANGEROUS WATER" constitute some protection against the risk of injury if the person decides to take a swim? I think that maybe too narrow a view of a warning notice which serves a composite purpose of turning a visitor into a trespasser and also warning him of a danger. But this case does not rest there. The misuse of the facility, the extent of the unauthorised swimming, the history of accidents and the perceived risk of fatality was noted and acted upon by the occupiers over many years. They did not, as may have been the fact in some of the other decided cases, treat the notice as sufficient to discharge any duty that might be owed. Here the authorities employed rangers whose duty it was to give oral warnings against swimming albeit that this met with mixed success and sometimes attracted abuse for their troubles. In addition to the oral warnings, the rangers would hand out safety leaflets which warned of the variable depth in the pond, the cold, the weeds, the absence of rescue services, waterborne diseases and the risk of accidents occurring. It seems to me that the rangers' patrols and advice and the handing out of these leaflets reinforced the ineffective message on the sign and constituted "some protection" in fact given and reasonably expected to be offered in the circumstances of this case. Congleton Beach, as the place was also known, was as alluring to "macho" young men as other dangerous places were to young children. In my judgment the gravity of the risk of injury, the frequency with which those using the park came to be exposed to the risk, the failure of warning signs to curtail the extent to which the risk was being run, indeed the very fact

that the attractiveness of the beach and the lake acted as a magnet to draw so many into the cooling waters, all that leads me to the conclusion that the occupiers were reasonably to be expected to offer some protection against the risks of entering the water. It follows that in my judgment the defendants were under a duty to the plaintiff.

30 The standard of care is defined by section 1(4). It is "to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned". By now the focus has to be on the duty owed to the individual claimant whereas at the earlier stages of the inquiry it was probably more accurate to think of ***59** the duty owed to the claimant as a member of a class of persons, young or old, nefariously on the premises or using them to the occupier's knowledge, if not with his permission. The Law Commission rejected the invitation to give guidelines for determining what may reasonably be expected of an occupier. I should do likewise. Whilst, therefore, this does not pretend to be a checklist, it is obvious that among the facts and circumstances which inevitably will have to be taken into account--and this is not an exhaustive list by any means--the court will have regard to the age and character of the claimant, the nature and purpose of the trespassory entry on the premises, the extent to which any protective steps which were taken had proved to have been inadequate, the difficulty or ease with which steps could be taken to reduce or eliminate the danger and the question of the cost of taking those precautions balanced against the gravity of the risks of injury. Once again the key words are "reasonable in all the circumstances of the case".

31 Before looking at the matter generally, the question under section 1(5) arises first. Is this an appropriate case where the duty can be said to have been discharged by the warnings given of the danger concerned and the discouragement to persons from incurring the risk of injury from that danger? Subsection (5) expressly recognises that the giving of a warning "*may*" in an appropriate case, discharge the duty. It follows that a warning does not necessarily or inevitably discharge the duty. In the time-honoured phrase, it must all be a matter of fact and degree. That, in my judgment, is the weakness of the judgment under appeal. The judge found that the risk was obvious, which means no more than that the plaintiff acknowledged the inevitable, namely that diving into water where one cannot see the bottom creates the risk that one will dive too steeply and so suffer injury. That may be a sufficient answer in many cases, perhaps even most cases. But here the history both of the danger and of the exposure to it drove the authorities inevitably, and rightly, to the conclusion that warnings were not working. The authorities were inviting public use of this amenity knowing that the water was a siren call strong enough to turn stout men's minds. In my judgment the posting of notices, shown to be ineffective, was not enough to discharge the duty.

32 The next question is whether the plaintiff willingly accepted as his the risk of his suffering injury from the dangers concerned. There are, in my judgment, two answers to this. The first is that the plaintiff did not freely and voluntarily accept the risk. For the defence to succeed it must be shown that he had full knowledge of the nature and extent of the risk he ran and impliedly agreed to incur it. I accept the submission made on the plaintiff's behalf that he made an assumption which was erroneous that it was safe to dive. He did not know that the water where he dived was so shallow and the dive he made so steep that he would be injured. There were risks in general but he thought that what he did was safe. He did not freely and voluntarily wish the injury on himself. The

second point is that if the duty on the defendants was to take reasonable steps to prevent the plaintiff from diving into the mere, then the defendants concede that they could not seek to argue that in diving into the mere the plaintiff voluntarily assumed the risk of injury attendant upon such act. I have identified the risk of injury to be the risk of entering the water but, in agreement with Turner J in Bartrum v Hepworth Minerals and Chemicals Ltd (unreported) 29 October 1999, the ***60** greater includes the less and consequently upon entering the water there is a risk of diving into it.

33 The crucial question is, therefore, whether there was a breach by the defendants of the duty owed to the plaintiff. What care was it reasonable in all the circumstances of this case for the authorities to take to see that the plaintiff did not suffer injury on the premises by reason of the danger concerned? The defendant's own documents provide the answer. The recommendation after a Water Safety Site Visit on 11 May 1990 was: 'The creation of beach areas is a great encouragement for people to indulge in beach-type activities and this includes swimming. Suggest cutting down on beach area by increasing reed zones."

34 Dealing with water safety in Cheshire, a meeting on 25 May 1990 noted that precautions against the hazards of swimming included introducing reed beds in littoral zones and planting shrubs on the littoral zone. It was said that precautions which could easily be implemented should be undertaken with immediate effect.

35 On 7 December 1992 the minutes of the Congleton Countryside Progress Meeting reveal that the estates department was being asked for a plan and costings for covering the beach areas.

36 When the rangers met on 19 January 1994 the borough council's area service manager stated that a decision had been taken by the council to remove the beaches; that £10,000 had been allocated for that purpose but that the proposal had not been activated because of financial restraint. At the same time Mr Tyler-Jones, the chairman of the Cheshire Water Safety Committee, was reporting that his major recommendation to remove the beaches had not been carried out. Later in March he recommended a reputable landscape architect to advise on suitable plant species to reclaim the water margins. The Brereton Heath Park Management Advisory Group were told in July 1994 that the 1994/95 bid for landscaping the beaches had been rejected but there was the possibility of money being left at the end of the year to do one beach at a time. The following month, on 10 August, "all agreed on the urgency to take action to landscape the beaches to deter swimming". In putting forward a recommendation to cover the beach with soil and planting the margin of the water with reeds and other aquatic plants at a capital cost of £15,000 it was stated: "We have on average three or four near drownings every year and it is only a matter of time before someone dies. The recommendation from the National Water Safety Committee, endorsed by county councils is that something must now be done to reduce the 'beach areas' both in size and attractiveness. If nothing is done about this and someone dies the borough council is likely to be held liable and would have to accept responsibility."

At a meeting of the community services committee of the borough council on 21 November the general capital programme for 1995/96 allocated £5,000 for safety improvements to the Brereton Heath country park. The work of covering the beach with topsoil and planting the beaches began shortly before this accident.

37 In my judgment the defendants, prudent and responsible as they showed themselves to

be, came under a duty to the plaintiff to carry out the *61 landscaping and planting that was recommended in the minutes I have recited. The carrying out of the work presented no practical problems and if carried out was likely to prove to be and in fact did turn out to be an effective deterrent to swimming in the mere. The expense, be it £5,000 or £15,000, was not excessive, especially having regard to the serious risk of injury from the accident that was waiting to happen.

38 It follows that in my judgment the defendants were in breach of a duty they owed the plaintiff to take reasonable care to see that he did not suffer injury at the country park by reason of the dangers which awaited those who entered the water for a swim.

39 The final question is the extent to which the court thinks it just and equitable that the damages recoverable be reduced having regard to the plaintiff's share in the responsibility for the damage. The judge would have assessed his contribution at two-thirds, an apportionment Mr Machell supports whereas Mr Braithwaite submits the proportions be reversed--one-third to the plaintiff, two-thirds to the defendant. The plaintiff knew he should not enter the water and he took some risk. The defendants knew that someone was bound to do just that sooner or later and that comparatively simple remedial steps would absolve them from responsibility. If the matter had been left to my judgment, I would have held that the relative share of blameworthiness and the relative importance of the acts and omissions in causing this damage fell equally on plaintiff and defendant. However, this court is always loath to interfere with an assessment of contributory negligence even where the judge expressed his conclusions from the difficult position that he had already found against the plaintiff. Since Sedley and Longmore LJJ, whose judgments I have been able to read in draft, would not interfere with the judge's apportionment, I recognise that my views should not be imposed.

40 I do not pretend to have found this case easy. My views have swung one way and the other. That admitted, I am satisfied now that the appeal must be allowed and the matter must be remitted to the High Court for the assessment of damages to be reduced by two-thirds for the plaintiff's contributory negligence.

SEDLEY LJ

41 I agree with Ward LJ that this appeal should be allowed. But because I have read Longmore LJ's judgment in favour of dismissing the appeal, I add some brief reasoning of my own.

42 I do not consider that it is appropriate to reason out a claim like the present one from its consequences. If the logic of our decision is that other public lakes and ponds require similar precautions to those which were lacking at Brereton Heath, so be it. But negligence is fact-specific, and we are able neither to determine what the occupiers' duties are in other places nor to predicate our decision on what its effect on those occupiers might be. We are creating no duty and no standard of care which is not already laid down by Parliament. Our task, like that of the trial judge, is simply to apply a general law to specific facts.

43 The other matter to which Longmore LJ draws attention is the particularity of the hazard to which the plaintiff fell prey. It is, I agree, an apparent oddity that a person who is injured by diving into shallow water--a pretty obvious hazard--should be able to claim the benefit of precautions *62 which in reality were needed in order to stop people losing

their footing where the lake bed shelved steeply or becoming entangled in thick weeds. But there are two separate answers, one relating to the obviousness of the hazard, the other to its nature.

44 As to the nature of the hazard, it was rightly not argued by the defendants that this could make the difference between liability and no liability in the present case. It is well settled by authority that if there is a duty to protect people against foreseeable injury, it does not matter if the accident which happens was not itself foreseeable, so long as it is not in an entirely different league: see Hughes v Lord Advocate [1963] AC 837 and Smith v Leech Brain & Co Ltd [1962] 2 QB 405.

45 If primary liability is established, the obviousness of the hazard goes to contributory negligence; for it is only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability. Even so, in a gross case contributory negligence can approach one hundred per cent. This is not such a case, but it is a case in which the plaintiff did something which he was old enough to realise was stupid--not so much by entering the mere (everyone was doing that, and the defendants had failed to take reasonable measures to stop it) but by diving steeply from a standing position in a couple of feet of water. I see no reason to differ from Jack J's contingent assessment of the plaintiff's share of responsibility for his consequent misfortune as two thirds.

46 The nub of the defendants' case was that the mere did not present any unusual or special risks at all. As to this, the logic of Ward LJ's judgment seems to me compelling, and I do not need to add to it. I would accordingly allow the appeal and direct entry of judgment for one third of the damages to be assessed.

LONGMORE LJ

47 One of the dangers of going for a swim in any stretch of water other than a dedicated swimming pool is that the swimmer may slip and injure himself. He may also quickly find himself out of his depth and be unable to cope; he may get cramp or be assailed by the coldness of the water and be unable to recover. All these are obvious dangers to anyone except a small and unaccompanied child. Another danger is that a swimmer may decide to dive into the water and hit his head on the bottom, if the water is too shallow; in my judgment that is an equally obvious danger and cannot provide a reason for saying that the owner or occupier of the water should be under any duty to take reasonable steps to prevent people swimming or diving in the relevant stretch of water.

48 The position would, of course, be different if the occupier knew of some concealed danger or some danger that was not obvious to people using the water. But in this case Jack J has held in terms that there was nothing about the mere at Brereton Heath which made it any more dangerous than any other ordinary stretch of open water in England. The judge thought (and I agree) that if there was a duty to take reasonable steps to prevent public access for the purpose of swimming at Brereton Heath, similar steps would have to be taken in relation to other stretches of open water in the country.

49 Mr John Tomlinson has suffered appalling injuries as a result of his unfortunate dive while enjoying the water on a warm May bank holiday ***63** weekend in 1995. Mr Braithwaite on his behalf has submitted that the mere at Brereton Heath was a special case different from other stretches of water because: (1) the heath was a managed site

where the defendants encouraged the public to go to spend their leisure time; (2) the defendants knew that accidents were liable to happen (and, indeed, had happened on three previous occasions); and (3) the defendants were in the process of taking steps to eliminate injuries from swimming accidents in that they: (a) put up signs prohibiting swimming; (b) when it became clear that the signs were being ignored, they were advised that the beaches on the mere should be fenced off and covered in vegetation but had not got round to doing this by the time of Mr Tomlinson's accident.

50 I do not consider that these factors either singly or together make the mere at Brereton Heath different from other stretches of open water. The fact that the defendants arranged and even promoted the site for leisure activity does not mean that they should have taken reasonable steps to prevent swimming unless they knew of any particular hazard. Even then it would probably be sufficient to give a warning in relation to that hazard. There was here no allegation or evidence of any particular hazard, beyond the ordinary hazards of swimming in open water.

51 The fact that during the defendants' management of the site three accidents had occurred to people swimming in the mere cannot of itself impose a duty of care since swimming in open stretches of water is often an inherently dangerous activity. It would only be if the number of accidents was significantly above the norm that any duty could arise and that would then be because it would be possible to conclude that there was a particular hazard in relation to the stretch of water (even if the hazard might not at first be easily identifiable). Likewise, the fact that a local authority may responsibly seek to deter or prevent swimming does not to my mind give rise to any duty to an individual member of the public or the public at large to take steps to prevent people swimming, unless there is a particular hazard (over and above the ordinary risks of swimming) about which the public should know.

52 I should add that, for myself, I would have reached the same conclusion even if the plaintiff had not conceded that he was a trespasser. I find it odd that if there is a general licence to the public to come to a park for leisure activities but there are notices which prohibit swimming, someone who enters the water intending to swim becomes a trespasser. At what point does he become a trespasser? When he starts to paddle, intending thereafter to swim? There was no evidence that Mr Tomlinson in fact swam at all. He dived from a position in which swimming was difficult, if not impossible. I would be troubled if the defendants' duty of care differed depending on the precise moment when a swim could be said to have begun.

53 For these reasons which are much the same as those given by this court in Darby v National Trust [2001] PIQR P372, it seems to me that this appeal should fail. It is noteworthy that the Supreme Court of Canada seems to have come to a similar conclusion in relation to a similar stretch of water in British Columbia: see Vancouver-Fraser Park District v Olmstead (1974) 51 DLR (3d) 416.

54 On contributory negligence, I would not interfere with the judge's apportionment.

**64 Appeal allowed with costs. Case remitted for damages to be assessed. Permission to appeal refused.*

23 July. The Appeal Committee of the House of Lords (Lord Slynn of Hadley, Lord Hoffmann and Lord Millett) allowed a petition by the defendants for leave to appeal.

Solicitors: Paul Ross & Co, Manchester; James Chapman & Co, Manchester.

H D

The defendants appealed.

Raymond Machell QC and *Peter Burns* for the defendants. None of the hurdles presented by subsections (1)(a), (3)(c) and (4) of section 1 of the 1984 Act can be surmounted on the facts of this case. Also relevant are subsections (5) and (6). Consideration of each needs to be directed to the individual non-visitor rather than to a class: see Staples v West Dorset District Council (1995) 93 LGR 536, 541; Ratcliff v McConnell [1999] 1 WLR 670, 683, para 44 and Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1020, 1024, paras 41, 54. Section 1(3)(c) clearly refers to the individual rather than to a class. The question under section 1(3)(c) is whether there is a duty in the circumstances of the case, taking the background into account.

The principal faults of Ward LJ's reasoning are (a) it fails properly to identify the danger "due to the state of the premises"; (b) it fails to describe any unusual danger in the premises: a false impression is given by the statement in para 21; (c) although Ward LJ was right to take account of "all the circumstances of the case", as required under sections 1(3)(c) and 1(4), he gave overemphasis to the defendants' prior attempts and recommendations to discourage swimming; (d) apparently (see para 30) he construed section 1(3) with reference to a class of persons rather than to the individual; (e) although he made passing reference (see para 19) to the genesis of the Act, he failed to contrast the duty to visitors under the Occupiers' Liability Act 1957: the duty under the 1984 Act is "significantly less exacting" (see Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1018, para 31); the Law Commission (Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (1976) (Law Com No 75) (Cmnd 6428)) had in mind a much lower duty in the case of a trespasser than in that of a visitor; (f) he gave insufficient weight to the finding of Jack J that the danger and risk of injury from diving in the lake where it was shallow were obvious.

The principal criticisms of Sedley LJ's reasoning (paras 42 and 45) are (a) whilst it may not be appropriate to allow consequences to dictate the reasoning, the potential consequences in other cases of ordinary stretches of open water ought to be taken into account as a matter of public policy; (b) the remark at paragraph 45 fails to contrast the nature and extent of the duty under the 1957 Act with that (if any) under the 1984 Act. The nub of **65* the defendants' case was, indeed, "that the mere did not present any unusual or special risks at all" (para 46). The "compelling logic" that defeated it is difficult to identify; if it is the fact of the prior history of accidents, the reasoning of Longmore LJ at para 51, namely, that "swimming in open stretches of water is often an inherently dangerous activity", is adopted, as is his reasoning generally, which should be preferred. The "fact-specific" nature of the case (para 42) amounts, on analysis (see per Longmore LJ), to no more than frequent use and previous accidents merely illustrative of the inherent dangers of swimming: cf per Harman J in Whyte v Redland Aggregates Ltd (unreported) 27 November 1997; Court of Appeal (Civil Division) Transcript No 2034 of 1997.

The 1957 and 1984 Acts were intended to be complementary. As to the development of the 1957 Act, see Fairchild v Glenhaven Funeral Services Ltd [2002] 1 WLR 1052, 1083-1088, paras 113-130. The essence of the common law duty was to take "reasonable care to prevent damage from *unusual* danger": see Indermaur v Dames (1866) LR 1 CP 274, 288 and London Graving Dock Co Ltd v Horton [1951] AC 737. As to the development of the 1984 Act, see Ratcliff v McConnell [1999] 1 WLR 670, 678-680, paras 31-34;

Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1019, 1025-1029, 1030, paras 33-34, 59-72, 78 and the Law Commission's Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (Law Com No 75) (Cmnd 6428), paras 4-11, 23 and 26-29.

The relevant risk/danger here arose simply by reason of the activity in which the plaintiff chose to indulge, which carried inherent risk of injury, not by reason of any danger due to the state of the premises under section 1(1)(a) of the 1984 Act: see the Donoghue case, at p 1024, para 53. The Act is thus not engaged; neither would the 1957 Act, which has similar wording, have been if the plaintiff had been a visitor. The plaintiff contends that the fact that the defendants provided a park adjacent to water brings the case within section 1(1)(a) as "things done", but that is not sufficient: the danger must be "*due to*" things done. A causal link has to be established. The plaintiff's argument is a circular one. No inferences can properly be drawn from previous accidents, for the reasons explained by Longmore LJ at para 51. The analysis of Lord Phillips of Worth Matravers MR in the Donoghue case, at p 1019, paras 34-37 is adopted.

Alternatively, if a relevant danger due to the state of the premises can properly be identified, it did not give rise to any duty on the defendants under section 1(3) of the 1984 Act, since the risk was not one against which they might reasonably have been expected to offer the plaintiff some protection pursuant to section 1(3)(c), the focus being on the facts and the individual trespasser. Relevant features, as found by Jack J, are that (a) the plaintiff was an adult; (b) the risk was known to him; (c) it was obvious; (d) there were no unusual dangers in or special characteristics of the mere; the risk was inherent; (e) there were highly visible notices that the plaintiff ignored. In the words of Lord Phillips MR in the Donoghue case, at p 1019, para 34, he appreciated the risk but deliberately courted it.

Alternatively, since on the facts found by Jack J the plaintiff willingly accepted the risk, section 1(6) of the 1984 Act precludes the imposition of a duty.

**66* The 1984 Act was not (see per Brooke LJ in the Donoghue case, at p 1030, para 78) intended to alter the "general philosophy of the law relating to trespassers", which itself reflects the individualist philosophy of the common law that persons of full age and sound understanding must look after themselves and take responsibility for their actions: cf per Lord Hoffmann, in a different context, in Reeves v Comr of Police of the Metropolis [2000] 1 AC 360, 368.

A large number of cases have considered the relevance of obvious dangers in the context of occupiers' liability and concluded that there is no duty to warn in such cases: see Staples v West Dorset District Council 93 LGR 536, 541; Whyte v Redland Aggregates Ltd (unreported) 27 November 1997; Court of Appeal (Civil Division) Transcript No 2034 of 1997, p 12, per Henry LJ; Darby v National Trust [2001] PIQR P372, 378, para 27 and Ratcliff v McConnell [1999] 1 WLR 670, 680-681, para 37. Many of these cases concerned visitors, where any duty is more onerous than here. If there is no duty to warn, it would be illogical to impose a duty to prevent exposure to the obvious risk/danger: see Longmore LJ's conclusion, ante, paras 47-48, on the facts of the present case. The factors relied on by the plaintiff cannot undermine Jack J's central finding as to the nature of the mere, for the reasons explained by Longmore LJ, ante, paras 50 and 51.

Alternatively, if a duty was owed under section 1(3), its extent is provided by section 1(4) and accordingly there was no breach. In particular, section 1(4) cannot reasonably have

required the defendants to prevent access to the water, as decided by the Court of Appeal. Any duty extended at most to giving warning of the danger, and the warning notices posted discharged the duty, as contemplated by section 1(5). This duty should be contrasted with the common duty of care under section 2(2) of the 1957 Act. As Jack J found, at para 29, "the signs were reasonable and sufficient steps to give warning of the danger and to discourage persons from incurring the risk". The fact that adults, especially adult trespassers, ignored the signs "was a decision which they were free to make: they could choose to accept the risk". Lord Diplock's third proposition in Herrington v British Railways Board [1972] AC 877, 941- 942 is still apposite, albeit it predated the reference of the 1984 Act: see per Stuart-Smith LJ in Ratcliff v McConnell [1999] 1 WLR 670, 680, para 34 and Lord Phillips MR in Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1018, para 30. To require an obstacle, as well as a warning, for an adult would be unreasonable in the case of a lawful visitor and is extreme in the case of a trespasser. Ward LJ, ante, paras 33-37, appears to have been greatly influenced by the defendants' prior concerns and recommendations to landscape and plant the shoreline. This is unfair to them: the test as to what constitutes the care reasonable in the circumstances must be viewed objectively, and an occupier ought not to be in a worse position if he exceeds or proposes to exceed such standard: see per Longmore LJ, ante, para 51. It is inappropriate to take into account what the defendants did by way of stopping access to the mere: see Ratcliff v McConnell [1999] 1 WLR 670, 681-683, para 44 and McGlone v British Railways Board 1966 SC(HL) 1, 12-13.

The need for protection cannot be considered in a vacuum. The effect on other members of the public has to be taken into account. Further, the potential consequences of such a conclusion in this case, despite accepting its **67* "fact-sensitive" nature, would be to impose intolerable burdens on riparian owners in many, unpredictable, circumstances and to harm the amenity of access to waterfronts by members of the public, in order to protect adults willingly engaging in activities that carry ordinary inherent risk of injury. Such a consequence would be contrary to public policy.

Only limited assistance may be gained by reference to decisions in other common law jurisdictions because this case depends essentially on breach of an English statutory duty and its own facts. However, see Vancouver-Fraser Park District v Olmstead (1974) 51 DLR (3d) 416 and the majority judgments in Romeo v Conservation Commission of the Northern Territory (1998) 151 ALR 263, 280-281, 299-300, 307-308, paras 50, 123-124 and 157. In Australia the distinction between visitors and trespassers has been abandoned, but note the significance placed by the High Court of Australia on the obviousness of the danger and the wider consequences of imposing a duty, including the impact on public amenity/utility. Nagle v Rottnest Island Authority (1993) 177 CLR 423 is of limited assistance. The defendants encouraged the plaintiff to swim and there were hidden dangers. As to the United States, almost all states have enacted recreational use statutes exempting occupiers from liability arising from recreational use; examples are thus limited but see Bucheleres v Chicago Park District (1996) 171 Ill 2d 435, 457, where the "social utility of our lakefront areas" was emphasised as "an important concern".

Bill Braithwaite QC and *Gerard Martin QC* for the plaintiff. The following factors are important. (1) The public did then, and do now, exercise access to recreational premises nationwide on a vast scale. It is in the public interest that some protection should be afforded to them, even though they may technically be trespassers, where in all the

circumstances it is fair, just and reasonable so to do. (2) It was the intention of the 1984 Act that a balance should be struck between those persons accessing land who were to be regarded as trespassers and the rights and duties of the owner of that land. The Act provides a template wide enough to encompass the infinite variety of circumstances that apply on the facts of each case and to enable the court to do justice. (3) To approve guidance from the case law cited by the defendants to the effect that where the risk is objectively obvious to the adult no duty is owed would be a failure to apply the legislation to the facts; as Ward LJ observed, ante, para 20, it is a statement of a consequence, not the application of a principle. As to the application of the facts to the law, and their significance, Ward LJ's approach is adopted. (4) The legislation in its language requires a fact-sensitive investigation: see Jolley v Sutton London Borough Council [2000] 1 WLR 1082, 1089, cited by Ward LJ, ante, para 18. (5) The premises here were offered by the defendants for recreational use by the public, who were encouraged to use them as a leisure facility.

As to the legislative history, see the Law Commission's Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (Law Com No 75) (Cmnd 6428), paras 13, 16, 20-23, 27, 34 and 36-41 and HL Debates, 12 July 1983, cols 720-723; 27 October 1983, cols 370-371. The purpose of clause 2 of the Law Commission's draft Bill was to enable landowners to permit recreational access subject to terms excluding liability for the safety of the premises. It was to encourage access ***68** to the countryside while maintaining a balance of rights between landowners and the public accessing the land. That same purpose had a resonance in clause 1. See further HL Debates, 12 July 1983, col 742, further emphasising the fact-sensitive nature of the inquiry; HL Debates, 27 October 1983, cols 368, 370 and 376 and HC Debates, Standing Committee J, 2 February 1984, p 4. Scrutiny of the Law Commission's Report and Hansard indicate that Parliament was aware of the tension between landowner and trespasser and of the need not to overburden the landowner and yet to facilitate, and make safe, access to the countryside for the public. The ensuing legislation must be taken to have achieved that balance without the need for further judicial gloss. It is apparent that Parliament did not intend the imposition of an "obvious risk, therefore no duty" principle. Section 2(1) of the Occupiers' Liability (Scotland) Act 1960 has, by a similar fact-sensitive mechanism, provided a flexible facility that did not result in problems reported by the Law Commission as to its operation in practice in Scotland: see para 34 of its Report.

As to the defendants' case, the observations of Lord Phillips MR in Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1020, paras 40-41 are adopted. One has to look to the entirety of section 1(1)(a) of the 1984 Act to reach the correct construction. Its words were intended to embrace conduct by action or inaction on the premises causing a continuing source of danger; see the views of the Law Commission at paragraph 23 of their Report. Thus, by inference, dangers arising by activities (things done or omitted to be done) by or on behalf of a person qua occupier were intended to give rise to potential liability. The defendants' case concentrates on the words in section 1(1)(a) "danger due to the state of the premises" almost to the exclusion of the remainder of that phrase: "or to things done or omitted to be done on them ". The defendants' use of the premises is one of the distinguishing features of this case. The same observation may be made about the phrase used by Lord Phillips MR in Donoghue v Folkestone Properties Ltd [2003] QB

1008, 1024, para 53, cited by them. (A petition for leave to appeal in that case is pending the outcome of the present.) The defendants themselves acknowledged (see the water safety site visit report of the county council's water safety officer of 13 March 1996) that the activity of sunbathing, paddling and swimming, encouraged by them in the wide sense of inviting the public into the park area, involved the risk that a range of people entering the water in uncontrolled conditions would encounter dangers of varying kinds, including the uncertain depth of the water.

The reason for the amendment of clause 1(3) of the Occupiers' Liability Bill, which at that stage was in the plural, was the concern that the use of the plural "persons" might induce the courts to construe the subsection as if the same duty were owed by the occupier to all his guests: see HL Debates, 27 October 1983, cols 370-371. It was not to ensure that the duty was owed to the individual. "Category of visitor" (col 371) is a reference to a class of trespasser, not an individual, and section 1(3)(c) and (4) should be construed accordingly. Accordingly, in considering the issue of "some protection" in section 1(3)(c) the court is not confined to the attributes of the plaintiff. As to section 1(3)(b) and the use of the singular "the other", see per Lord Phillips MR in the Donoghue case, at p 1020, para 41; compare, however, para 54, at p 1024. No court has said that section 1(3)(b) relates to the **69* individual trespasser who is injured. The class of visitor that was of concern in the present case was a broad one, namely, all those members of the public tempted to use the mere for swimming. "Another" means the class of people who could be expected to be in the water. The defendants thus had to anticipate a wide age range and likewise great variety of ability. If there were obstructions, the defendants should have been thinking of *all* of them, not just the particular one involved; similarly, they should have been thinking of *all* swimmers who might get into difficulty, not just one who might hit his head on the sandy bottom. The extent of the duty depends on the sort of person using it.

As to the defendants' reliance on the individualist philosophy of the common law, a similar view was reported in the Law Commission's Report as the view of the minority: see paragraph 13. The Report suggests that the misgivings of the minority were to be catered for in the proposals of the majority that no duty arose unless, after a fact-sensitive inquiry, it was reasonable so to require.

As to the defendants' reliance on case law to the effect that where the risk is obvious no duty to warn arises, such concepts distract a tribunal from the fact-sensitive inquiry required by the template provided by section 1(3). On the facts of this case, the defendants, in their deliberations in committee, realised that the obvious nature of the risk was not an answer that was acceptable in the face of the risk to life and health that could be avoided by modest financial outlay. Alternatively, it was not obvious to the plaintiff, nor to the hundreds or thousands of other leisure seekers who entered the water throughout the summer, that there was a risk beyond normal. If this had been an outdoor swimming pool it probably would have been obligatory to mark depths and generally to manage it so that exuberant people of all ages were protected from the well known risks attendant on leisure water use. The defendants have effectively been running an informal outdoor swimming pool without any of the management that would otherwise have been required. If warning notices do not stop people swimming, the defendants need to do more. Section 1(5) anticipates that a warning may not be enough: see Whyte v Redland Aggregates Ltd, (unreported) 27 November 1997; Court of Appeal (Civil Division)

Transcript No 2034 of 1997 and Scott v Associated British Ports (unreported) 22 November 2000; Court of Appeal (Civil Division) Transcript No 2062 of 2000, where paras 15 and 20 represent the plaintiff's case. Moreover, the duty to warn is not the duty overall, which is a duty to do something about it. It is not right to say that because there is no duty to warn there is no duty at all. [Reference was also made to Ratcliff v McConnell [1999] 1 WLR 670; Donoghue v Folkestone Properties Ltd [2003] QB 1008; Herrington v British Railways Board [1972] AC 877; Staples v West Dorset District Council 93 LGR 536, 541 and Darby v National Trust [2001] PIQR P372.

The defendants' "floodgates" argument attempts to liken the park, operated as a leisure attraction with water as the centrepiece, to all sorts of other, isolated, unused, undeveloped stretches of water. If the inquiry as to the existence of a duty, and its extent, is fact-sensitive, then the location and nature of the water will be significant in the establishment of the requirements under section 1. Similarly, an inquiry as to what is fair, just **70* and reasonable would involve consideration of the nature of the water feature, its location, its popularity with the public and the surrounding element of management by the occupier. The plaintiff's case would not prevent any access of significance to the countryside. The facts are exceptional, though there is no distinction in principle between, say, Snowdon and this lake. The Act makes no such distinction.

As to voluntary acts, see Reeves v Comr of Police of the Metropolis [2000] 1 AC 360. When a person does something for which he has not been invited, he ceases to be a visitor.

Martin QC following. As to comparative law, note how Kirby J in Romeo v Conservation Commission of the Northern Territory 151 ALR 263, 297, 298, para 117 put the three-stage test for determining whether a duty of care exists. Nagle v Rottnest Island Authority 177 CLR 423 was apparently not overruled. In so far as comparative jurisdictions are of help, it may be noteworthy that the Australian Occupiers' Liability Act 1985 provides in section 5(4) that in determining whether an occupier of premises has discharged his duty of care consideration shall be given to, inter alia, the knowledge that the occupier of premises has or ought to have of the likelihood of persons entering them: paragraph (d). That might be taken to suggest that, even when considering whether there has been a breach of duty, it is relevant for the occupier to consider persons (in the plural) being on the premises, not just the individual.

In the Romeo case there was emphasis on the application of the facts to the problem and the conclusion was in favour of the appellant. If the local authority has a rigid policy, that may prevent such application. Vancouver-Fraser Park District v Olmstead 51 DLR (3d) 416 really concerned perverse verdicts. The factual circumstances are not clear. Much reliance should not be placed on the case. [Reference was also made to Bucheleres v Chicago Park District 171 Ill 2d [435].

Machell QC in reply. The Nagle case is not very helpful on its facts: see how it was dealt with in the Romeo case, especially at pp 17, para 65, and 31, para 131.

In so far as it is argued that this was simply a matter of fact, it was decided by Jack J.

As to the status of the plaintiff and whether he becomes a trespasser, see The Carlgarth [1927] P 93, 110 (Scrutton LJ) and Hillen v ICI (Alkali) Ltd [1936] AC 65, 69 (Lord Atkin).

The Report of the Law Reform Committee (Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers (1954) (Cmd 9305)), which contains a very helpful

resume of the common law, shows that this was not an accident due to the state of the premises or things done: see para 76, p 32. It strongly supports the defendants' submission that under either the 1957 or the 1984 Act one is talking about something unusual. The facts of this case therefore do not fall within its purview.
As to the example of Snowdon, see the amendments to the 1984 Act by section 13 of the Countryside and Rights of Way Act 2000, not yet in force. There are echoes of Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] AC 358: see HL Debates, 27 October 1983, col 368. Even **71* unamended, the 1984 Act does not readily impose a duty to guard against natural features of land.
The 1957 Act was an attempt to rationalise the common law as regards duties owed to people invited in various capacities on the premises. The Law Reform Committee specifically considered trespassers and concluded that the law should not be changed. That was followed by Herrington v British Railways Board [1972] AC 877. There was no intention in 1984 of introducing any revolutionary change: the Act simply put in statutory form a clearer form of duty as accepted in the Herrington case. It was not concerned solely with trespassers; it was concerned also with non-visitors, including those exercising rights under the National Parks and Access to the Countryside Act 1949 and rights of way. A lower standard of duty, if any, was to be owed to non-visitors than to visitors.
"Acts or omissions" must, first, be "*due to*", which is not the case here. Secondly, the plaintiff's argument is circular because, if the danger was due to the water, it was not due to any act or omission. One therefore has to address the question whether the danger was due to the state of the premises. "Danger" in section 1(3) of the 1984 Act is a limited danger. One has to focus on the danger that ultimately is the source of the claim. At the end of the day, the injury has to be due to the danger that gives rise to the breach of duty. One need not identify a particular obstruction, which would be too limited, but the plaintiff's "all dangers from going into the water" is too wide. The danger is the danger from diving; it should not be put any more broadly.
As to whether section 1(3) is directed to the individual or to a class, Lord Phillips MR's observations in Donoghue v Folkestone Properties Ltd [2003] QB 1008 are adopted. It is *this* individual. As Lord Phillips said, it would be illogical to approach it in any other way. The fact that in the Herrington case it would have been reasonable to offer children some protection from getting on to the line could not apply to adults. Against the background of these two Acts, it would not have been reasonable to offer the plaintiff some protection. That was the reason for the two-stage process introduced by the Law Commission (see subsections (3) and (4) of section 1 of the 1984 Act). It cannot be right to impose a duty to prevent people swimming of their own choice. It would extraordinary if the defendants were in a worse position than the National Trust. There was nothing to distinguish this from any ordinary seaside beach.
Their Lordships took time for consideration.

LORD NICHOLLS OF BIRKENHEAD

1 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

The accident

2 My Lords, in rural south-east Cheshire the early May Bank Holiday weekend in 1995 was unseasonably hot. John Tomlinson, aged 18, had to work until midday on Saturday, 6 May but then met some of his friends and ***72** drove them to Brereton Heath Country Park, between Holmes Chapel and Congleton. The park covers about 80 acres. In about 1980 Congleton Borough Council acquired the land, surrounding what was then a derelict sand quarry, and laid it out as a country park. Paths now run through woods of silver birch and in summer bright yellow brimstone butterflies flutter in grassy meadows. But the attraction of the park for John Tomlinson and his young friends was a 14-acre lake which had been created by flooding the old sand quarry. The sandy banks provided some attractive beaches and in hot weather many people, including families with children, went there to play in the sand, sunbathe and paddle in the water. A beach at the far end of the lake from the car park was where in fine weather groups of teenagers like John Tomlinson would regularly hang out. He had been going there since he was a child.
3 After sitting in the hot sun for a couple of hours, John Tomlinson decided that he wanted to cool off. So he ran out into the water and dived. He had done the same thing many times before. But this time the dive was badly executed because he struck his head hard on the sandy bottom. So hard that he broke his neck at the fifth vertebra. He is now a tetraplegic and unable to walk.
4 It is a terrible tragedy to suffer such dreadful injury in consequence of a relatively minor act of carelessness. It came nowhere near the stupidity of Luke Ratcliff, a student who climbed a fence at 2.30 a m on a December morning to take a running dive into the shallow end of a swimming pool (see Ratcliff v McConnell [1999] 1 WLR 670) or John Donoghue, who dived into Folkestone Harbour from a slipway at midnight on 27 December after an evening in the pub: Donoghue v Folkestone Properties Ltd [2003] QB 1008. John Tomlinson's mind must often recur to that hot day which irretrievably changed his life. He may feel, not unreasonably, that fate has dealt with him unfairly. And so in these proceedings he seeks financial compensation: for the loss of his earning capacity, for the expense of the care he will need, for the loss of the ability to lead an ordinary life. But the law does not provide such compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault. In order to succeed in his claim, that is what Mr Tomlinson has to prove.

Occupiers' liability

5 In these proceedings Mr Tomlinson sues the Congleton Borough Council and the Cheshire County Council, claiming that as occupiers of the park they were in breach of their duties under the Occupiers' Liability Acts 1957 and 1984. If one had to decide which of the two councils was the occupier, it might not be easy. Although the park

belongs to the borough council, it is managed on their behalf by the Countryside Management Service of the county council. The borough council provides the funds to enable the Countryside Management Service to maintain the park. It is the county which employs the Rangers who look after it. But the two councils very sensibly agreed that one or other or both was the occupier. Unless it is ***73** necessary to distinguish between the county council and the borough council for the purpose of telling the story, I shall call them both "the council".

Visitor or trespasser?

6 The 1957 Act was passed to amend and codify the common law duties of occupiers to certain persons who came upon their land. The common law had distinguished between invitees, in whose visit the occupier had some material interest, and licensees, who came simply by express or implied permission. Different duties were owed to each class. The Act, on the recommendation of the Law Reform Committee (Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers (1954) (Cmd 9305)), amalgamated (without redefining) the two common law categories, designated the combined class "visitors" (section 1(2)) and provided that (subject to contrary agreement) all visitors should be owed a "common duty of care". That duty is set out in section 2(2), as refined by subsections (3) to (5):

"(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

"(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases--(a) an occupier must be prepared for children to be less careful than adults; and (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

"(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)--(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

"(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

7 At first Mr Tomlinson claimed that the council was in breach of its common duty of

care under section 2(2). His complaint was that the premises were not reasonably safe because diving into the water was *74 dangerous and the council had not given adequate warning of this fact or taken sufficient steps to prevent or discourage him from doing it. But then a difficulty emerged. The county council, as manager of the park, had for many years pursued a policy of prohibiting swimming or the use of inflatable dinghies or mattresses. Canoeing and windsurfing were allowed in one area of the lake and angling in another. But not swimming; except, I suppose, by capsized canoeists or windsurfers. Notices had been erected at the entrance and elsewhere saying "DANGEROUS WATER. NO SWIMMING". The policy had not been altogether effective because many people, particularly rowdy teenagers, ignored the notices. They were sometimes rude to the Rangers who tried to get them out of the water. Nevertheless, it was hard to say that swimming or diving was, in the language of section 2(2), one of the purposes "for which [Mr Tomlinson was] invited or permitted by the occupier to be there". The council went further and said that once he entered the lake to swim, he was no longer a "visitor" at all. He became a trespasser, to whom no duty under the 1957 Act is owed. The council cited a famous bon mot of Scrutton LJ in The Carlgarth [1927] P 93, 110: "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters ". This quip was used by Lord Atkin in Hillen v ICI (Alkali) Ltd [1936] AC 65, 69 to explain why stevedores who were lawfully on a barge for the purpose of discharging it nevertheless became trespassers when they went on to an inadequately supported hatch cover in order to unload some of the cargo. They knew, said Lord Atkin, at pp 69-70, that they ought not to use the covered hatch for this purpose; "for them for such a purpose it was out of bounds; they were trespassers". So the stevedores could not complain that the barge owners should have warned them that the hatch cover was not adequately supported. Similarly, says the council, Mr Tomlinson became a trespasser and took himself outside the 1957 Act when he entered the water to swim.

8 Mr Tomlinson's advisers, having reflected on the matter, decided to concede that he was indeed a trespasser when he went into the water. Although that took him outside the 1957 Act, it did not necessarily mean that the council owed him no duty. At common law the only duty to trespassers was not to cause them deliberate or reckless injury, but after an inconclusive attempt by the House of Lords to modify this rule in Herrington v British Railways Board [1972] AC 877, the Law Commission recommended the creation of a statutory duty to trespassers: see its Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (1976) (Law Com No 75) (Cmnd 6428). The recommendation was given effect by the 1984 Act. Section 1(1) describes the purpose of the Act:

"The rules enacted by this section shall have effect, in place of the rules of the common law, to determine--(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and (b) if so, what that duty is."

9 The circumstances in which a duty may arise are then defined in sub-section (3) and the content of the duty is described in subsections (4) to (6): *75

"(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if--(a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) he knows or has reasonable grounds

to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether he has lawful authority for being in that vicinity or not); and (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
"(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.
"(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.
"(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."
10 Mr Tomlinson says that the conditions set out in subsection (3) were satisfied. The council was therefore under a duty under subsection (4) to take reasonable care to see that he did not suffer injury by reason of the danger from diving. Subsection (5) shows that although in appropriate circumstances it may be sufficient to warn or discourage, the notices in the present case had been patently ineffectual and therefore it was necessary to take more drastic measures to prevent people like himself from going into the water. Such measures, as I shall later recount in detail, had already been considered by the council.
11 The case has therefore proceeded upon a concession that the relevant duty, if any, is that to a trespasser under section 1(4) of the 1984 Act and not to a lawful visitor under section 2(2) of the 1957 Act. On one analysis, this is a rather odd hypothesis. Mr Tomlinson's complaint is that he should have been prevented or discouraged from going into the water, that is to say, from turning himself into a trespasser. Logically, it can be said, that duty must have been owed to him (if at all) while he was still a lawful visitor. Once he had become a trespasser, it could not have meaningful effect. In the Court of Appeal, ante, p 63f-g, para 52, Longmore LJ was puzzled by this paradox:
"At what point does he become a trespasser? When he starts to paddle, intending thereafter to swim? There was no evidence that Mr Tomlinson in fact swam at all. He dived from a position in which swimming was difficult, if not impossible. I would be troubled if the defendants' duty of care differed depending on the precise moment when a swim could be said to have begun."
12 In the later case of Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1021, para 45 Lord Phillips of Worth Matravers MR said that he shared these reservations about the concession: **76*
"What was at issue in the case was whether the council should have taken steps which would have prevented Mr Tomlinson from entering the lake, that is, whether a duty of care was owed to him before he did the unauthorised act."
13 As a matter of logic, I see the force of these observations. But I have nevertheless come to the conclusion that the concession was rightly made. The duty under the 1984 Act was intended to be a lesser duty, as to both incidence and scope, than the duty to a

lawful visitor under the 1957 Act. That was because Parliament recognised that it would often be unduly burdensome to require landowners to take steps to protect the safety of people who came upon their land without invitation or permission. They should not ordinarily be able to force duties upon unwilling hosts. In the application of that principle, I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do. In both cases, the entrant would be imposing upon the landowner a duty of care which he has not expressly or impliedly accepted. The 1984 Act provides that even in such cases a duty may exist, based simply upon occupation of land and knowledge or foresight that unauthorised persons may come upon the land or authorised persons may use it for unauthorised purposes. But that duty is rarer and different in quality from the duty which arises from express or implied invitation or permission to come upon the land and use it.

14 In addition, I think that the concession is supported by the high authority of Lord Atkin in Hillen v ICI (Alkali) Ltd [1936] AC 65. There too, it could be said that the stevedores' complaint was that they should have been warned not to go upon the hatch cover and that logically this duty was owed to them, if at all, when they were lawfully on the barge.

15 I would certainly agree with Longmore LJ that the incidence and content of the duty should not depend on the precise moment at which Mr Tomlinson crossed the line between the status of lawful visitor and that of trespasser. But there is no dispute that the act in respect of which Mr Tomlinson says that he was owed a duty, namely, diving into the water, was to his knowledge prohibited by the terms upon which he had been admitted to the park. It is, I think, for this reason that the council owed him no duty under the 1957 Act and that the incidence and content of any duty they may have owed was governed by the 1984 Act. But I shall later return to the question of whether it would have made any difference if swimming had not been prohibited and the 1957 Act had applied.

16 It is therefore necessary to consider the conditions which section 1(3) of the 1984 Act requires to be satisfied in order that any duty under section 1(4) should exist. But before looking at the statutory requirements, I must say something more about the history of the lake, upon which Mr Braithwaite, who appeared for Mr Tomlinson, placed great reliance in support of his submission that the council owed him a duty with which it failed to comply.

The history of the lake

17 The working of the sand quarry ceased in about 1975 and for some years thereafter the land lay derelict. People went there for barbecues, camp ***77** fires, open air parties and swimming. The borough council bought the land in 1980 and most of the work of landscaping and planting was finished by 1983. The land was reclaimed for municipal recreation. But the traditions established in the previous anarchic state of nature were hard to eradicate. From the beginning, the county council's management plan treated swimming as an "unacceptable water activity". The minutes of the county council's Advisory Group of interested organisations (anglers, windsurfers and so forth) record that on 21 November 1983 the managers proposed to put up more signs to dissuade

swimmers: "The risk of a fatality to swimmers was stressed and agreed by all. " The windsurfers in particular were concerned about swimmers getting in their way; perhaps being injured by a fast-moving board. The chairman summed up by saying that although the lake with its sandy beaches was a great attraction to visitors, it was also a management problem because of misuse and dangerous activities on the water.

18 In the following year, 1984, the management reported that larger notice boards had prevented the swimming problem from getting any worse: "Every reasonable precaution had now been taken, but it was recognised that some foolhardy persons would continue to put their lives at risk."

19 The management report for 1988 stated that a major concern was:

"the unauthorised use of the lake and the increasing possibility of an accident; this is swimming and the use of rubber boats. Warnings are ignored by large numbers who see Brereton as easy, free access to open water. On busy days the overwhelming numbers make it impossible to control this use of the lake, and it is difficult to see how the situation can change unless the whole concept of managing the park and the lake is revised."

20 In 1990 there was an inspection by Mr Victor Tyler-Jones, the county council's water safety officer. He reported that the swimming problem continued, due to the ease of access, the grassy lakeside picnic areas and the beaches and the long history of swimming in the lake. His recommendation was to reduce the beach areas by planting them with reeds. His guidelines for the entire county said that swimming in lakes, rivers and ponds should be discouraged:

"We do not recommend swimming as a suitable activity for any of our managed sites. Potential swimmers could be dissuaded by noticeboard reference to less pleasant features, e g, soft muddy bottom, danger of contracting Weil's disease, presence of blue-green algae."

If this did not have the desired effect, ballast should be dumped on beaches and banks to make them muddy and unattractive and reeds and shrubs should be planted.

21 The money to implement these recommendations had to be provided by the borough council, which was under some financial pressure. But impetus was provided in the summer of 1992 by a number of incidents. Over Whitsuntide there were three cases of "near-drowning resulting in hospital visits". The only such incident of which more details are available concerned a man who "was swimming in lake, after drinking, and got into difficulty". He was rescued by a relative, resuscitated by an off-duty **78* paramedic and taken to hospital. Two men cut their heads by hitting them on something when diving into the lake; there is no information about where they dived. Mr Kitching, the county council's countryside manager, prepared a paper for the borough council at the end of the first week in June. He said that the park had become very popular:

"The total number of visitors now exceeds 160,000 per annum ... The lake acts as a magnet to the public and has become heavily used for swimming in spite of a no swimming policy due to safety considerations ... Advice has been sought from the county council's water safety officer as to how the problem should be addressed and this has been carefully followed. Notices are posted warning of the dangers and leaflets are handed to visitors to emphasise the situation. Lifebelts and throwing lines are provided for use in emergencies. In spite of these actions the public continue to ignore the advice and the requests of the rangers not to swim. The attitude is that they will do what they

want to do and that rangers should not interfere with their enjoyment. There have been several occasions when small children have been out in the middle of the lake and their parents have been extremely rude to staff when approached about this. As a result of the general flaunting of the policy there have been a number of near fatalities in the lake with three incidents requiring hospital treatment in the week around Whitsun. Whilst the rangers are doing all they can to protect the public it is likely to be only a matter of time before someone drowns."

22 In July 1992 the borough council's leisure officer visited the Park and concluded that the notices and leaflets were not having the desired effect. On 23 July 1992 he proposed to other officers the preparation of a report to the borough council recommending the adoption of Mr Tyler-Jones's scheme for making the beaches less hospitable to visitors:

"I want the water's edge to be far less accessible, desirable and inviting than it currently is for children's beach/water's edge type of play activities. I personally find this course of action a regrettable one but I have to remind myself that council policy was to establish a country park and not specifically to provide a swimming facility, no matter how popular this may have become in consequence. To provide a facility that is open to the public and which contains beach and water areas is, in my view, an open invitation and temptation to swim and engage in other water's edge activities despite the cautionary note that is struck by deterrent notices, etc, and in that type of situation accidents become inevitable. We must therefore do everything that is reasonably possible to deter, discourage and prevent people from swimming or paddling in the lake or diving into the lake ... Work should be prepared for the report with a view to implementation of a scheme at the earliest opportunity, bearing in mind that we shall require a supplementary estimate for the exercise ..."

23 As a result of this proposal, the borough leisure officer was asked to prepare a feasibility report with costings. £5,000 was provided in the draft estimates for the borough's Amenities and Leisure Services Committee, but it was one of many items deleted at the committee's meeting on 1 March 1993 ***79** to achieve a total saving of £200,000. In 1994, the officers tried again. It was listed as a "desirable" growth bid in the budget (below "essential" and "highly desirable"). But the bid failed. When it came to the 1995 budget round, the officers presented a strongly-worded proposal:

"Cheshire Countryside Management Service has now taken all reasonable steps with regard to providing information and attempting to educate the public about the dangers of bathing in the lake. This has had a limited effect on the numbers entering the water for short periods but there are still numbers of people, including young children, swimming, paddling and using inflatable rafts and dinghies whenever the weather is warm and sunny. We have on average three or four near-drownings every year and it is only a matter of time before someone dies. The recommendation from the National Safety Water Committee, endorsed by county councils, is that something must now be done to reduce the 'beach areas' both in size and attractiveness. If nothing is done about this and someone dies the borough council is likely to be held liable and would have to accept responsibility."

24 The borough council found this persuasive and in 1995 £5,000 was allocated to the scheme. But the work had not yet begun when Mr Tomlinson had his accident. At that time, the beach to which he and his friends had been accustomed to go since childhood was still there. The diggers, graders and planters arrived to destroy it a few months later.

The scope of the duty under the 1984 Act

25 The conditions in section 1(3) of the 1984 Act determine whether or not a duty is owed to "another" in respect of "any such risk as is referred to in subsection (1)". Two conclusions follow from this language. First, the risks in respect of which the Act imposes a duty are limited to those mentioned in subsection (1)(a)--risks of injury "by reason of any danger due to the state of the premises or to things done or omitted to be done on them". The Act is not concerned with risks due to anything else. Secondly, the conditions have to be satisfied in respect of the claimant as "another"; that is to say, in respect of a class of persons which includes him and a description of risk which includes that which caused his injury.

A danger "due to the state of the premises"

26 The first question, therefore, is whether there was a risk within the scope of the statute; a danger "due to the state of the premises or to things done or omitted to be done on them". The judge found that there was "nothing about the mere at Brereton Heath which made it any more dangerous than any other ordinary stretch of open water in England". There was nothing special about its configuration; there were no hidden dangers. It was shallow in some places and deep in others, but that is the nature of lakes. Nor was the council doing or permitting anything to be done which created a danger to persons who came to the lake. No power boats or jet skis threatened the safety of either lawful windsurfers or unlawful swimmers. So the council submits that there was no danger attributable to the state of premises or things done or omitted on them. In Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1024, para 53 Lord Phillips of Worth ****80*** Matravers MR expressed the same opinion. He said that he had been unable to identify the "state of the premises" which carried with it the risk of the injury suffered by Mr Tomlinson: "It seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state."

27 In making this comment, the Master of the Rolls was identifying a point which is in my opinion central to this appeal. It is relevant at a number of points in the analysis of the duties under the 1957 and 1984 Acts. 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. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises.

28 Mr Braithwaite was inclined to accept the difficulty of establishing that the risk was due to the state of the premises. He therefore contended that it was due to "things done or omitted to be done" on the premises. When asked what these might be, he said that they

consisted in the attraction of the lake and the council's inadequate attempts to keep people out of the water. The council, he said, were "luring people into a deathtrap". Ward LJ said that the water was "a siren call strong enough to turn stout men's minds". In my opinion this is gross hyperbole. 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. In my opinion "things done or omitted to be done" means activities or the lack of precautions which cause risk, like allowing speedboats among the swimmers. It is a mere circularity to say that a failure to stop people getting into the water was an omission which gave rise to a duty to take steps to stop people from getting into the water.

29 It follows that in my opinion, there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises. That means that there was no risk of a kind which gave rise to a duty under the 1957 or 1984 Acts. I shall nevertheless go on to consider the matter on the assumption that there was.

The conditions for the existence of a duty

(i) Knowledge or foresight of the danger

30 Section 1(3) has three conditions which must be satisfied. First, under paragraph (a), the occupier must be aware of the danger or have reasonable grounds to believe that it exists. For this purpose, it is necessary to say what the relevant danger was. The judge thought it was the risk of **81* suffering an injury through diving and said that the council was aware of this danger because two men had suffered minor head injuries from diving in May 1992. In the Court of Appeal, Ward LJ described the relevant risk much more broadly. He regarded all the swimming incidents as indicative of the council's knowledge that a danger existed. I am inclined to think that this is too wide a description. The risk of injury from diving off the beach was in my opinion different from the risk of drowning in the deep water. For example, the council might have fenced off the deep water or marked it with buoys and left people to paddle in the shallows. That would have reduced the risk of drowning but would not have prevented the injury to Mr Tomlinson. We know very little about the circumstances in which two men suffered minor cuts to their heads in 1992 and I am not sure that they really provide much support for an inference that there was knowledge, or reasonable grounds to believe, that the beach posed a risk of serious diving injury. Dr Penny, a consultant occupational health and safety physician with long experience of advising organisations involved in acquatic sports (and himself a diver) said that the *Code of Safety for Beaches*, published in 1993 by the Royal Life Saving Society and the Royal Society for the Prevention of Accidents, made no mention of diving risks, no doubt assuming that, because there was little possibility of high diving from a beach, the risk of serious diving injuries was very small compared with the risk of drowning. I accept that the council must have known that there was a possibility that some boisterous teenager would injure himself by horseplay in the shallows and I would not disturb the concurrent findings that this was sufficient to satisfy paragraph (a). But

the chances of such an accident were small. I shall return later, in connection with condition (c), to the relevance of where the risk comes on the scale of probability.

(ii) Knowledge or foresight of the presence of the trespasser

31 Once it is found that the risk of a swimmer injuring himself by diving was something of which the council knew or which they had reasonable grounds to believe to exist, paragraph (b) presents no difficulty. The council plainly knew that swimmers came to the lake and Mr Tomlinson fell within that class.

(iii) Reasonable to expect protection

32 That leaves paragraph (c). Was the risk one against which the council might reasonably be expected to offer the plaintiff some protection? The judge found that "the danger and risk of injury from diving in the lake where it was shallow were obvious". In such a case the judge held, both as a matter of common sense and following consistent authority (Staples v West Dorset District Council (1995) 93 LGR 536, Ratcliff v McConnell [1999] 1 WLR 670 and Darby v National Trust [2001] PIQR P372), that there was no duty to warn against the danger. A warning would not tell a swimmer anything he did not already know. Nor was it necessary to do anything else. "I do not think," said the judge, "that the defendants' legal duty to the plaintiff in the circumstances required them to take the extreme measures which were completed after the accident." Even if Mr Tomlinson had been owed a duty under the 1957 Act as a lawful visitor, the council would not have been obliged to do more than they did. **82*

33 The Court of Appeal disagreed. Ward LJ said that the council was obliged to do something more. The gravity of the risk, the number of people who regularly incurred it and the attractiveness of the beach created a duty. The prohibition on swimming was obviously ineffectual and therefore it was necessary to take additional steps to prevent or discourage people from getting into the water. Sedley LJ, ante, p 62b-c, para 45 said: "it is only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability." Longmore LJ dissented. The majority reduced the damages by two-thirds to reflect Mr Tomlinson's contributory negligence, although Ward LJ said that he would have been inclined to reduce them only by half. The council appeals against the finding of liability and Mr Tomlinson appeals against the apportionment, which he says should have been in accordance with the view of Ward LJ.

The balance of risk, gravity of injury, cost and social value

34 My Lords, the 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. Even in the case of the duty owed to a lawful visitor under section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, 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 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.
35 For example, in Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound) [1967] 1 AC 617, there was no social value or cost saving in the defendant's activity. Lord Reid said, at p 643:
"In the present case there 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."
36 So the defendants were held liable for damage which was only a very remote possibility. Similarly in Jolley v Sutton London Borough Council [2000] 1 WLR 1082 there was no social value or cost saving to the Council in creating a risk by leaving a derelict boat lying about. It was something which they ought to have removed whether it created a risk of injury or not. So they were held liable for an injury which, though foreseeable, was not particularly likely. On the other hand, in The Wagon Mound (No 2) [1967] 1 AC 617 Lord Reid, at p 642, drew a contrast with Bolton v Stone [1951] AC 850 in which the House of Lords held that it was not negligent for a cricket club to do nothing about the risk of someone being injured by a cricket ball hit out of the ground. The difference was that the cricket club **83* were carrying on a lawful and socially useful activity and would have had to stop playing cricket at that ground.
37 This is the kind of balance which has to be struck even in a situation in which it is clearly fair, just and reasonable that there should in principle be a duty of care or in which Parliament, as in the 1957 Act, has decreed that there should be. And it may lead to the conclusion that even though injury is foreseeable, as it was in Bolton v Stone, it is still in all the circumstances reasonable to do nothing about it.

The 1957 and 1984 Acts contrasted

38 In the case of the 1984 Act, there is the additional consideration that unless in all the circumstances it is reasonable to expect the occupier to do something, that is to say, to "offer the other some protection" (section 1(3)(c)), there is no duty at all. One may ask what difference there is between the case in which the claimant is a lawful visitor and there is in principle a duty under the 1957 Act but on the particular facts no duty to do anything, and the case in which he is a trespasser and there is on the particular facts no duty under the 1984 Act. Of course in such a case the result is the same. But Parliament has made it clear that in the case of a lawful visitor, one starts from the assumption that there is a duty whereas in the case of a trespasser one starts from the assumption that there is none.

The balance under the 1957 Act

39 My Lords, it will in the circumstances be convenient to consider first the question of what the position would have been if Mr Tomlinson had been a lawful visitor owed a duty under section 2(2) of the 1957 Act. Assume, therefore, that there had been no prohibition on swimming. What was the risk of serious injury? To some extent this

depends upon what one regards as the relevant risk. As I have mentioned, the judge thought it was the risk of injury through diving while the Court of Appeal thought it was any kind of injury which could happen to people in the water. Although, as I have said, I am inclined to agree with the judge, I do not want to put the basis of my decision too narrowly. So I accept that we are concerned with the steps, if any, which should have been taken to prevent any kind of water accident. According to the Royal Society for the Prevention of Accidents, about 450 people drown while swimming in the United Kingdom every year: see Darby v National Trust [2001] PIQR P372, 374. About 25 to 35 break their necks diving and no doubt others sustain less serious injuries. So there is obviously some degree of risk in swimming and diving, as there is in climbing, cycling, fell-walking and many other such activities.

40 I turn then to the cost of taking preventative measures. Ward LJ, ante, p 61a, para 37 described it (£5,000) as "not excessive". Perhaps it was not, although the outlay has to be seen in the context of the other items (rated "essential" and "highly desirable") in the borough council budget which had taken precedence over the destruction of the beaches for the previous two years.

41 I do not however regard the financial cost as a significant item in the balancing exercise which the court has to undertake. There are two other **84* related considerations which are far more important. The first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the council should be entitled to allow people of full capacity to decide for themselves whether to take the risk.

42 The Court of Appeal made no reference at all to the social value of the activities which were to be prohibited. 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.

43 I have the impression that the Court of Appeal felt able to brush these matters aside because the council had already decided to do the work. But they were held liable for having failed to do so before Mr Tomlinson's accident and the question is therefore whether they were under a legal duty to do so. Ward LJ placed much emphasis upon the fact that the council had decided to destroy the beaches and that its officers thought that this was necessary to avoid being held liable for an accident to a swimmer. But 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. In Darby v National Trust [2001] PIQR P372 the claimant's husband was tragically drowned while swimming in a pond on the National Trust estate at Hardwick Hall. Miss Rebecca Kirkwood, the water and leisure safety consultant to the Royal Society for the Prevention of Accidents, gave uncontradicted evidence, which the judge accepted, that the pond was unsuitable for swimming because it was deep in the middle and the edges were uneven. The National Trust should have made it clear that swimming in the pond was not allowed and taken steps to enforce the prohibition. But May LJ said robustly that it was for the court, not Miss Kirkwood, to decide whether the trust was under a legal duty to take such steps. There was no duty because the risks from swimming in the pond were perfectly obvious.

Free will

44 The second consideration, namely the question of whether people should accept responsibility for the risks they choose to run, is the point made by Lord Phillips of Worth Matravers MR in Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1024, para 53 and which I said was central to this appeal. Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. By contrast, Miss Bessie Stone (Bolton v Stone [1951] AC 850), to whom the House of Lords held that no duty was owed, was innocently standing on the pavement outside her garden gate at 10 Beckenham Road, Cheetham when she was struck by a ball hit for six out of the Cheetham Cricket Club ground. She was certainly not engaging in any activity which involved an inherent risk of such injury. So compared with Bolton v Stone, this is an a fortiori case.
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 ***85** 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.
46 My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. 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. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ, ante, p 62b-c, para 45, that it is "only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability". A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (Herrington v British Railways Board [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves: Reeves v Comr of Police of the Metropolis [2000] 1 AC 360.
47 It is of course understandable that organisations like the Royal Society for the Prevention of Accidents should favour policies which require people to be prevented from taking risks. Their function is to prevent accidents and that is one way of doing so. But they do not have to consider the cost, not only in money but also in deprivation of liberty, which such restrictions entail. The courts will naturally respect the technical expertise of such organisations in drawing attention to what can be done to prevent accidents. But the balance between risk on the one hand and individual autonomy on the other is not a matter of expert opinion. It is a judgment which the courts must make and which in England reflects the individualist values of the common law.
48 As for the council officers, they were obvious motivated by the view that it was

necessary to take defensive measures to prevent the council from being held liable to pay compensation. The borough leisure officer said that he regretted the need to destroy the beaches but saw no 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. On the other hand, if the decision of the Court of Appeal were left standing, every such occupier would feel obliged to take similar defensive measures. Sedley LJ, ante, p 61g, para 42 was able to say that if the logic of the Court of Appeal's decision was that other public lakes and ponds required similar precautions, "so be it". But I cannot view this prospect with the same equanimity. In my opinion it would damage the quality of many people's lives. **86*

49 In the particular case of diving injuries, there is little evidence that such defensive measures have had much effect. Dr Penny, the council's expert, said that over the past decade there had been little change in the rate of serious diving accidents. Each year, as I have mentioned, there are about 25 to 35 fracture-dislocations of the neck. Almost all those affected are males and their average age is consistently around 25 years. In spite of greatly increased safety measures, particularly in swimming pools, the numbers (when Dr Penny gave evidence) had remained the same for a decade:

"This is probably because of the sudden, unpredictable nature of these dangerous dives, undertaken mostly by boisterous young men ... hence the common description the 'macho male diving syndrome'."

50 My Lords, for these reasons I consider that even if swimming had not been prohibited and the council had owed a duty under section 2(2) of the 1957 Act, that duty would not have required them to take any steps to prevent Mr Tomlinson from diving or warning him against dangers which were perfectly obvious. If that is the case, then plainly there can have been no duty under the 1984 Act. The risk was not one against which he was entitled under section 1(3)(c) to protection. I would therefore allow the appeal and restore the decision of Jack J. It follows that the cross-appeal against the apportionment of damages must be dismissed.

LORD HUTTON

51 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann, and I gratefully adopt his account of the background facts to the tragic injury which Mr Tomlinson suffered in the lake in Brereton Heath Country Park in Cheshire. I agree with your Lordships that the appeal brought by Congleton Borough Council and Cheshire County Council should be allowed, but as I was attracted for a considerable time during the hearing of the appeal by the plaintiff's argument supporting the reasoning of Ward LJ in the Court of Appeal (with which Sedley LJ agreed) that Mr Tomlinson was entitled to recover damages, I wish to add some observations of my own.

52 I approach the case on the basis that Mr Tomlinson was, in strict law, a trespasser at the time he dived and struck his head on the bottom of the lake. It is clear that he was invited by the defendants to come to the country park but it is also clear that swimming in the lake was expressly prohibited by the appellants and, as the trial judge found, Mr

Tomlinson was fully aware of this prohibition. Therefore when he began to dive he became a trespasser because, as Lord Atkin stated in Hillen v ICI (Alkali) Ltd [1936] AC 65, 69:
"So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly."
However I agree with Lord Hoffmann that even if the respondent had not been a trespasser at the time of his dive but had been a visitor within the meaning of the **87* Occupiers' Liability Act 1957, he would still not have been entitled to recover damages.
53 In relation to section 1(1)(a) of the Occupiers' Liability Act 1984 I recognise that there is force in the argument that the injury was not due to the state of the premises but was due to the respondent's own lack of care in diving into shallow water. But the trial judge found that Mr Tomlinson could not see the bottom of the lake and, on balance, I incline to the view that dark and murky water which prevents a person seeing the bottom of the lake where he is diving can be viewed as "the state of the premises" and that if he sustains injury through striking his head on the bottom which he cannot see this can be viewed as a danger "due to the state of the premises". If water were allowed to become dark and murky in an indoor swimming pool provided by a local authority and a diver struck his head on the bottom I consider that the danger could be regarded as "due to the state of the premises", and whilst there is an obvious difference between such water and water in a lake which in its natural state is dark and murky, I think that the term "the state of the premises" can be applied both to the swimming pool and to the lake.
54 Section 1(3) and (4) provide:
"(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if--(a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
"(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned."
55 There is no doubt from the reports and proposals of the appellants' officials to the borough's Amenities and Leisure Services Committee and to the borough council which Lord Hoffmann has described that paragraphs (a) and (b) of section 1(3) are satisfied. If section 1(3) were satisfied and the risk was one against which, in all the circumstances of the case, the appellants might reasonably be expected to offer the respondent some protection, I consider that there would be an argument of some force that they were in breach of the duty specified in section 1(4), because the minutes of the meetings showed that they knew that there were dangers to persons swimming or diving in the lake (there had been two cases of swimmers sustaining head injuries) and they knew that the dangers might lead to death or serious injury, but they had decided not to take the recommended steps such as planting reeds on the beach, which would probably have stopped

swimming, because of financial constraints, although the cost of these precautionary measures would have been only in the region of £15,000.
56 Therefore I think the crucial question is whether the respondent has established that the risk was one to which section 1(3)(c) applies. On this point the reasoning of Ward LJ was contained in paragraph 29 of his judgment, ante, p 58e-f: **88*
"Here the authorities employed rangers whose duty it was to give oral warnings against swimming albeit that this met with mixed success and sometimes attracted abuse for their troubles. In addition to the oral warnings, the rangers would hand out safety leaflets which warned of the variable depth in the pond, the cold, the weeds, the absence of rescue services, waterborne diseases and the risk of accidents occurring. It seems to me that the rangers' patrols and advice and the handing out of these leaflets reinforced the ineffective message on the sign and constituted 'some protection' in fact given and reasonably expected to be offered in the circumstances of this case."
57 I thought for a time that this reasoning was persuasive, but I have concluded that it should not be accepted because I consider that it is contrary to a principle stated in the older authorities which is still good law. In Stevenson v Glasgow Corpn 1908 SC 1034, 1039 Lord M'Laren stated:
"in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature; and whether the stream be sluggish like the Clyde at Glasgow, or swift and variable like the Ness at Inverness, or the Tay at Perth, there is always danger to the individual who may be so unfortunate as to fall into the stream. But in none of these places has it been found necessary to fence the river to prevent children or careless persons from falling into the water. Now, as the common law is just the formal statement of the results and conclusions of the common sense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by common sense as unnecessary and inconvenient are not required by the law."
58 In Glasgow Corpn v Taylor [1922] 1 AC 44, 61 Lord Shaw of Dunfermline stated: "Grounds thrown open by a municipality to the public may contain objects of natural beauty, say precipitous cliffs or the banks of streams, the dangers of the resort to which are plain." Lord Shaw then cited with approval the words of Lord M'Laren in Stevenson v Glasgow Corpn 1908 SC 1034, 1038 that "in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures". I think that when Lord M'Laren referred to physical features against which "it is impossible to guard by protective measures" he was not referring to protective measures which it is physically impossible to put in place; rather he had in mind measures which the common sense of mankind indicates as being unnecessary to take. This statement echoed the observation of the Lord President, Lord Dunedin, in Hastie v Edinburgh Magistrates 1907 SC 1102, 1106 that there are certain risks against which the law, in accordance with the dictates of common sense, does not give protection--such risks are "just one of the results of the world as we find it".
59 Stevenson v Glasgow Corpn and Hastie v Edinburgh Magistrates (which were not concerned with trespassers) were decided almost a century ago and the judgments are couched in old-fashioned language, but I consider ****89*** that they express a principle which

is still valid today, namely, that it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so. In my opinion this principle, although not always explicitly stated, underlies the cases relied on by the appellants where it has been held that the occupier is not liable where a person has injured himself or drowned in an inland lake or pool or in the sea or on some natural feature.

60 In Cotton v Derbyshire Dales District Council The Times 20 June 1994; Court of Appeal (Civil Division) Transcript No 753 of 1994, the Court of Appeal upheld the decision of the trial judge dismissing the plaintiff's claim for damages for serious injuries sustained from falling off a cliff. Applying the judgment of Lord Shaw in Glasgow Corpn v Taylor the Court of Appeal held that the occupiers were under no duty to provide protection against dangers which are themselves obvious.

61 In Whyte v Redland Aggregates Ltd (unreported) 27 November 1997; Court of Appeal (Civil Division) Transcript No 2034 of 1997, the plaintiff dived into a disused gravel pit and alleged that he had struck his head on an obstruction on the floor of the pit. The Court of Appeal dismissed his appeal against the judgment of the trial judge who held that he was not entitled to damages. Henry LJ stated:

"In my judgment, the occupier of land containing or bordered by the river, the seashore, the pond or the gravel pit, does not have to warn of uneven surfaces below the water. Such surfaces are by their nature quite likely to be uneven. Diving where you cannot see the bottom clearly enough to know that it is safe to dive is dangerous unless you have made sure, by reconnaissance or otherwise, that the diving is safe, i e, that there is adequate depth at the place where you choose to dive. In those circumstances, the dangers of there being an uneven surface in an area where you cannot plainly see the bottom are too plain to require a specific warning and, accordingly, there is no such duty to warn: see Lord Shaw in Glasgow Corpn v Taylor [1922] 1 AC 44, 60. There was no trap here on the judge's finding. There was just an uneven surface, as one would expect to find in a disused gravel pit."

62 In Bartrum v Hepworth Minerals and Chemicals Ltd (unreported) 29 October 1999, the claimant dived from a ledge on a cliff. In order to avoid shallow water he knew that he had to dive out into the pool but he failed to do so and fractured his neck. Turner J dismissed his claim for damages and stated:

"So far as the Act is concerned, by section 1(3) the defendants were under a duty to those whom they had reasonable grounds to believe would be in the vicinity of the danger, that is on the cliff for the purpose of diving, and the risk was one which, in all the circumstances, [they] may be reasonably expected to offer some protection. In my judgment the danger here was so obvious to any adult that it was not reasonably to be expected of the defendants that they would offer any protection."

63 In Darby v National Trust [2001] PIQR P372 the claimant's husband was drowned whilst swimming in a pond on National Trust **90* property. The Court of Appeal allowed an appeal by the National Trust against the trial judge's finding of liability and May LJ stated, at p 378:

"It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which

are not obvious. The same would apply to all inland lakes and reservoirs. In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased. That, in my view, applies as much to the risk that a swimmer might get into difficulties from the temperature of the water as to the risk that he might get into difficulties from mud or sludge on the bottom of the pond."

64 I also think that the principle stated by Lord M'Laren in Stevenson v Glasgow Corpn 1908 SC 1034 is implicit in paragraph 34 of the judgment of Lord Phillips of Worth Matravers MR in Donoghue v Folkestone Properties Ltd [2003] QB 1008, 1019. In that case the claimant dived from a slipway into Folkestone harbour after midnight in midwinter. He struck his head on a grid pile under the water adjacent to the harbour wall and broke his neck. The Court of Appeal allowed an appeal by the defendant against the trial judge's finding of liability. Lord Phillips of Worth Matravers MR stated, at p 1019:

"33. The obvious situation where a duty under the 1984 Act is likely to arise is where the occupier knows that a trespasser may come upon a danger that is latent. In such a case the trespasser may be exposed to the risk of injury without realising that the danger exists. Where the state of the premises constitutes a danger that is perfectly obvious, and there is no reason for a trespasser observing it to go near it, a duty under the 1984 Act is unlikely to arise for at least two reasons. The first is that because the danger can readily be avoided, it is unlikely to pose a risk of injuring the trespasser whose presence on the premises is envisaged.

"34. There are, however, circumstances in which it may be foreseeable that a trespasser will appreciate that a dangerous feature of premises poses a risk of injury, but will nevertheless deliberately court the danger and risk the injury. It seems to me that, at least where the individual is an adult, it will be rare that those circumstances will be such that the occupier can reasonably be expected to offer some protection to the trespasser against the risk."

Lord Phillips MR then went on to state that where a person was tempted by some natural feature of the occupier's land to engage in some activity such as mountaineering which carried a risk of injury, he could not ascribe to "the state of the premises" an injury sustained in carrying on that activity. However in the present case, as I have stated, I incline to the view that the dark and murky water can be viewed as "the state of the premises".

65 Therefore I consider that the risk of the plaintiff striking his head on the bottom of the lake was not one against which the defendants might **91* reasonably have been expected to offer him some protection, and accordingly they are not liable to him because they owed him no duty. I would add that there might be exceptional cases where the principle stated in Stevenson v Glasgow Corpn 1908 SC 1034 and Glasgow Corpn v Taylor [1922] 1 AC 44 should not apply and where a claimant might be able to establish that the risk arising from some natural feature on the land was such that the occupier might reasonably be expected to offer him some protection against it, for example, where there was a very narrow and slippery path with a camber beside the edge of a cliff from which a number of persons had fallen. But the present is not such a case and, for the reasons which I have given, I consider that the appeal should be allowed.

LORD HOBHOUSE OF WOODBOROUGH

66 My Lords, in this case the trial judge after having heard all the evidence made findings of fact which are now accepted by the claimant. There was nothing about the mere which made it any more dangerous than any other stretch of open water in England. Swimming and diving held their own risks. So if the mere was to be described as a danger, it was only because it attracted swimming and diving, which activities carry a risk. Despite having seen signs stating "Dangerous Water: No Swimming", the claimant ignored them. The danger and risk of injury from diving in the lake where it was shallow was obvious. At the time of the accident, the claimant was 18 years of age and had regularly been going to the park since he was a small child. He knew it well. The accident occurred when he waded into the water until the water was a little above his knees and threw himself forward in a dive or plunge. He knew that he should not. He could not see the bottom. In fact it was a smooth sandy surface without any obstruction or hazard. He dived deeper than he had intended and his head hit the sandy bottom causing his injury. Besides the notices already referred to, visitors were handed leaflets warning them of the dangers of swimming in the mere. Wardens patrolled the park and told people further that they should not swim in the mere. However it was the fact that visitors often took no notice and very many people did bathe in the mere in summer.
67 The claimant has made his claim for personal injuries under the Occupiers' Liability Act 1984 on the basis that at the time that he suffered his injury he was a trespasser in that he was swimming in the mere and swimming was, as he was aware, forbidden. This seems to me to be a somewhat artificial approach to the case; since paddling was apparently allowed but not swimming and the claimant was at the material time in water which only came a little above his knees. However, under the Occupiers' Liability Act 1957 (and at common law) when an invitee or licensee breaches the conditions upon which he has entered the premises, he ceases to be a visitor and becomes a trespasser: section 2(2). The claimant was permitted to enter the park on the condition that, inter alia, he did not swim in the mere. If he should swim in the mere, he broke this condition and as a result ceased to be a visitor. However, like all of your Lordships, I consider that whether he makes his claim under the 1984 Act or the 1957 Act, he does not succeed.
68 The two Acts apply the same general policy and the 1984 Act is a supplement to the 1957 Act. The earlier Act was the result of a re-examination of the common law relating to occupiers' liability. Its primary **92* purpose was to simplify the law. It had previously been based upon placing those coming on another's land into various different categories and then stipulating different standards of care from the occupier in respect of each category. This was the historical approach of the common law to the question of negligence and found its inspiration in Roman law concepts (as was the case in the law of bailment: Coggs v Bernard (1703) Ld Raym 909). By 1957, the dominant approach had become the "good neighbour" principle enunciated in Donoghue v Stevenson [1932] AC 562. But special rules still applied to relationships which were not merely neighbourly. One such was occupiers' liability. The relevant, indeed, principal simplification introduced in the 1957 Act was to introduce the 'common duty of care' as a single standard covering both invitees and licensees: see section 2(2). The 1957 Act applied only to visitors, i e persons coming on to the land with the occupier's express or implied consent. It did not apply to persons who were not visitors including trespassers. The 1984

Act made provision for when a duty of care should be owed to persons who were not visitors (I will for the sake of convenience call such persons "trespassers") and what the duty should then be, that is, a duty of care in the terms of section 1(3), more narrow than that imposed by the 1957 Act. Thus the duty owed to visitors and the lesser duty which may be owed to trespassers was defined in appropriate terms. But, in each Act, there are further provisions which define the content of the duty and, depending upon the particular circumstances, its scope and extent.

69 The first and fundamental definition is to be found in both Acts. The duty is owed "in respect of dangers due to the state of the premises or to things done or omitted to be done on them". In the 1957 Act it is section 1(1). In the 1984 Act it is in section 1(1)(a) which forms the starting point for determining whether any duty is owed to the trespasser (see also section 1(3)) and provides the subject matter of any duty which may be owed. It is this phrase which provides the basic definition of 'danger' as used elsewhere in the Acts. There are two alternatives. The first is that it must be due to the state of the premises. The state of the premises is the physical features of the premises as they exist at the relevant time. It can include footpaths covered in ice and open mine-shafts. It will not normally include parts of the landscape, say, steep slopes or difficult terrain in mountainous areas or cliffs close to cliff paths. There will certainly be dangers requiring care and experience from the visitor but it normally would be a misuse of language to describe such features as "the state of the premises". The same could be said about trees and, at any rate, natural lakes and rivers. The second alternative is dangers due to things done or omitted to be done on the premises. Thus if shooting is taking place on the premises, a danger to visitors may arise from that fact. If speedboats are allowed to go into an area where swimmers are, the safety of the swimmers may be endangered.

70 In the present case, the mere was used for a number of activities -- angling, board-sailing, sub-aqua, canoeing and sailing model yachts--but none of these was suggested to have given rise to any danger to the claimant or others. Therefore the claimant has to found his case upon a danger due to the "state of the premises". His difficulty is that the judge has found that there was none and he has accepted that finding. Therefore his case fails in **93* limine. If there was no such danger the remainder of the provisions of the Acts all of which depend upon the existence of such a danger cannot assist him. The claimant clearly appreciated this when he brought his claim since his statement of claim specifically pleaded that there had been "an obstruction under the surface of the water" on which he struck his head. The judge found that there was no such obstruction.

71 Section 2 of the 1957 Act deals with the content of the duty (if any). Thus section 2(2) defines the common duty of care as one

"to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

If swimming is not one of those purposes, the duty of care does not extend to him while he is swimming. Section 2(3) deals with what circumstances are relevant to assessing any duty owed. They include "the degree of care, and of want of care, which would ordinarily be looked for in such a visitor". Examples are given: "(a) an occupier must be prepared for children to be less careful than adults." A skilled visitor can be expected to appreciate and guard against risks ordinarily incident to his skilled activities: section 2(2)(b). An obvious instance of the second example is a steeplejack brought in to repair a spire or an

electrician to deal with faulty wiring. Here, the claimant was an 18-year-old youth who ought to be well able to appreciate and cope with the character of an ordinary lake. He can take care of himself; he does not need to be looked after in the same way as a child.
72 Turning to the 1984 Act, one can observe the same features. The basic requirement of a "danger due to the state of the premises" is there: section 1(1). Section 1(2) contains a cross-reference to section 2(2) of the earlier Act. Section 1(3) depends upon the existence, and knowledge, of a danger coming within section 1(1). The risk of personal injury arising from that danger must further be one against which, in all the circumstances, it is reasonable to expect the occupier "to offer the [trespasser] some protection". The equivalent phrase "reasonable in all the circumstances" is used in subsections (4) and (5). Subsection (5) specifically permits the use of warnings and discouragements against incurring the relevant risk.
73 It is an irony of the present case that the claimant has found it easier to put his case under the 1984 Act than under the 1957 Act and argue, in effect, that the occupier owed a higher duty to a trespasser than to a visitor. This is because the inclusion of the words in section 2(4), duty "to see that he does not suffer injury on the premises by reason of the danger concerned". The claimant did suffer injury whilst on the premises; the defendants failed to see that he did not. Whilst this argument in any event fails on account of the fundamental point that the state of the premises did not give rise to any danger, it would be perverse to construe these two Acts of Parliament so as to give the 1984 Act the effect which the claimant contends for. (See also the quotation from the Law Commission's Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability (1976) (Law Com No 75) (Cmnd 6428) by Brooke LJ in his judgment in Donoghue v Folkestone Properties Ltd[2003] QB 1008 **94*, 1028-1029, para 72.) The key is in the circumstances and what it is reasonable to expect of the occupier. The reference to warnings and discouragements in subsection (5) and the use of the words "some protection" in subsection (3)(c) both demonstrate that the duty is not as onerous as the claimant argues. Warnings can be disregarded (as was the case here); discouragements can be evaded; the trespasser may still be injured (or injure himself) while on the premises. There is no guarantee of safety any more than there is under the 1957 Act. The question remains what is it reasonable to expect the occupier to do for unauthorised trespassers on his land. The trespasser by avoiding getting the consent of the occupier, avoids having conditions or restrictions imposed upon his entry or behaviour once on the premises. By definition, the occupier cannot control the trespasser in the same way as he can control a visitor. The Acts both lay stress upon what is reasonable in all the circumstances. Such circumstances must be relevant to the relative duties owed under the two Acts.
74 Returning to the facts of this case, what more was it reasonable to expect of the defendants beyond putting up the notices and issuing warnings and prohibitions? It will not have escaped your Lordships that the putting up of the notices prohibiting swimming is the peg which the claimant uses to acquire the status of trespasser and the benefit of the suggested more favourable duty of care under the 1984 Act. But this is a case where, as held by the judge, all the relevant characteristics of this mere were already obvious to the claimant. In these circumstances, no purpose was in fact served by the warning. It told the claimant nothing he did not already know: Staples v West Dorset District Council (1995) 93 LGR 536, Whyte v Redland Aggregates Ltd (unreported) 27 November 1997; Court

of Appeal (Civil Division) Transcript No 2034 of 1997, Ratcliff v McConnell [1999] 1 WLR 670 and Darby v National Trust [2001] PIQR P372. The location was not one from which one could dive into water from a height. There was a shallow gradually sloping sandy beach. The bather had to wade in and the claimant knew exactly how deep the water was where he was standing with the water coming up to a little above his knees. The claimant's case is so far from giving a cause of action under the statute that it is hard to discuss coherently the hypotheses upon which it depends. There was no danger; any danger did not arise from the state of the premises; any risk of striking the bottom from diving in such shallow water was obvious; the claimant did not need to be warned against running that risk; it was not reasonable to expect the occupier to offer the claimant (or any other trespasser) any protection against that obvious risk.

75 Faced with these insuperable difficulties and with the fact that they had failed to prove the pleaded case, counsel for the claimant put the argument in a different way. They pointed to the internal reports and minutes disclosed by the defendant councils. Passing over a minute of 22 November 1984 which under the heading "Swimming" accurately stated:

"Probably as a result of the larger notice boards the problems of swimming were no worse than in previous years and perhaps marginally better. Every reasonable precaution had now been taken, but it was **95* recognised that some foolhardy persons would continue to put their lives at risk",

they referred to an undated report of some time in 1992 concerning swimming in the mere. It reported many instances of swimming during hot spells with up to 2,000 people present and as many as 100 in the water. It referred to the popularity of the extensive beach areas with families where children paddled and made sand-castles and groups picnicked, adding "not unnaturally many [people] will venture into the water for a swim". The "hazards" pointing to the likelihood of future problems were stated to include "lakeside grassy picnic area". The recommendations were directed at the beach areas: "Suggest cutting down on beach area by increasing reed zones." "Signs should indicate the nature of the hazard. E g 'Danger--Water 5 m deep'." It is clear that accidents such as that suffered by the claimant were not in the writer's mind. Other similar reports are referred to in the opinion of my noble and learned friend, Lord Hoffmann, and it is otiose to quote from them again.

76 In July of the same year a departmental memorandum referred to the council's policy to stop all swimming. It therefore called upon the council to engage on a scheme of landscaping to make "the water's edge to be far less accessible, desirable and inviting than it currently is for children's beach/water's edge type of play activities". The solution called for was to remove or cover over the beaches and replace them by muddy reed beds. Part of the reasoning was that with attractive beaches "accidents become inevitable " and "we must therefore do everything that is reasonably possible to deter, discourage and prevent people from swimming or paddling in the lake or diving into the lake". An estimate of cost was asked for.

77 Funds were short but in 1994 a request for finance was presented. It was based upon the public's disregard of the embargo on bathing in the lake despite having "taken all reasonable steps" to educate the public. The request states that "we have on average three or four near-drownings every year and it is only a matter of time before someone dies". "If nothing is done about [the landscaping] and someone dies the Borough Council is

likely to be held liable and would have to accept responsibility."This was the nub of the claimant's case. The situation was dangerous. The defendants realised that they should do something about it--remove the beaches and make the water's edge unattractive and not so easily accessible. They recognised that they would be liable if they did not do so. This reasoning needs to be examined.

78 The first point to be made is that the councils were always at liberty, subject to the Local Government Acts, to have and enforce a no swimming policy. Indeed this had all along been one of the factors which had driven their management of this park. Likewise, subject to the same important qualification, they were at liberty to take moral responsibility for and pay compensation for any accident that might occur in the park. It is to be doubted that this was ever, so stated, their view. But neither of these factors create any legal liability which is what is in question in the present case. If they mistakenly misunderstood what the law required of them or what their legal liabilities were, that does not make them legally liable. **96*

79 The second point is the mistreatment of the concept of risk. To suffer a broken neck and paralysis for life could hardly be a more serious injury; any loss of life is a consequence of the greatest seriousness. There was undoubtedly a risk of drowning for inexperienced, incompetent or drunken swimmers in the deeper parts of the mere or in patches of weed when they were out of their depth although no lives had actually been lost. But there was no evidence of any incident where anyone before the claimant had broken his neck by plunging from a standing position and striking his head on the smooth sandy bottom on which he was standing. Indeed, at the trial it was not his case that this was what had happened; he had alleged that there must have been some obstruction. There had been some evidence of two other incidents where someone suffered a minor injury (a cut or a graze) to their head whilst diving but there was no evidence that these two incidents were in any way comparable with that involving the claimant. It is then necessary to put these few incidents in context. The park had been open to the public since about 1982. Some 160,000 people used to visit the park in a year. Up to 200 would be bathing in the mere on a fine summer's day. Yet the number of incidents involving the mere were so few. It is a fallacy to say that because drowning is a serious matter there is therefore a serious risk of drowning. In truth the risk of a drowning was very low indeed and there had never actually been one and the accident suffered by the claimant was unique. Whilst broken necks can result from incautious or reckless diving, the probability of one being suffered in the circumstances of the claimant were so remote that the risk was minimal. The internal reports before his accident make the common but elementary error of confusing the seriousness of the outcome with the degree of risk that it will occur.

80 The third point is that this confusion leads to the erroneous conclusion that there was a significant risk of injury presented to the claimant when he went into the shallow water on the day in question. One cannot say that there was no risk of injury because we know now what happened. But, in my view, it was objectively so small a risk as not to trigger section 1(1) of the 1984 Act, otherwise every injury would suffice because it must imply the existence of some risk. However, and probably more importantly, 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 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.

81 The fourth point, one to which I know that your Lordships attach importance, is the fact that it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. 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 **97* notices? Does the law require that attractive waterside 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. But this is the road down which your Lordships, like other courts before, have been invited to travel and which the councils in the present case found so inviting. In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. 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 discussion of social utility in the Illinois Supreme Court is to the same effect: Bucheleres v Chicago Park District (1996) 171 Ill 2d 435, 457-458.

82 I cannot leave this case without expressing my complete agreement with the reasoning of the judgment of Lord Phillips of Worth Matravers MR, in Donoghue v Folkestone Properties Ltd [2003] QB 1008.

83 For these reasons and those given by my noble and learned friend, Lord Hoffmann, and in agreement with the judgment of Longmore LJ, I too would allow this appeal.

LORD SCOTT OF FOSCOTE

84 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Hoffmann. Subject to one reservation I am in complete agreement with the reasons he gives for allowing this appeal. But I find myself in such fundamental disagreement with the approach to this case by the majority in the Court of Appeal that I want to add, also, a few comments of my own.

85 My reservation is that the Act which must be applied to the facts of this case in order to decide whether the council is under any liability to Mr Tomlinson is, in my opinion, the Occupiers' Liability Act 1957, not the 1984 Act.

86 The 1957 Act regulates the duty of care which an occupier of premises owes to visitors to the premise: section 1(1). "Visitors" are persons who would, at common law, be invitees or licensees: section 1(2). The 1984 Act, on the other hand, applies to persons on the premises who are not visitors but are trespassers. It lays down the criteria for deciding whether the occupier of the premises owes any duty of care at all to the trespasser in question in relation to the type of injury he has suffered: section 1(3). If a duty of care is owed, the Act describes the duty: section 1(4).

87 Mr Tomlinson's case against the council is based on an alleged breach of the duty of care they owed him. There is no doubt at all that he was a visitor at the park. The park was open to the public and he was entitled to be there. Wearing the shoes of a visitor, he was owed the duty of care prescribed by the 1957 Act.
88 The notices prominently displayed at various places in the park forbade swimming in the lake. But entry into the water was not forbidden. Visitors to the park were entitled to paddle and splash in the shallows of the lake. Many did so, particularly children. They were entitled to run into the water and splash one another. They were entitled to lie in the shallows and **98* let the cool water lap over them. In doing these things they were visitors and were owed the 1957 Act duty of care. All they were forbidden to do was to swim. If they had started swimming, using the lake for a purpose which was forbidden, they would have lost their status as visitors and become trespassers. The 1984 Act would then have applied.
89 Mr Tomlinson did not suffer his tragic accident while swimming in the lake. He ran into the water and, when the depth of the water was at mid-thigh level, executed the disastrous "dive" and suffered the accident. At no stage did he swim. It may be that his "dive" was preparatory to swimming. But swimming in water not much above knee level, say 2 feet 6 inches deep, is difficult. There might be some element of flotation but I do not think the activity would normally justify the use of the verb "swim". In any event, Mr Tomlinson's injury was not caused while he was swimming and cannot be attributed in any way to the dangers of swimming. His complaint against the council is that the council did not take reasonable care to discourage him while in the shallows of the lake from executing a "dive". If the "dive" was, which I regard as doubtful for the reasons given, a preliminary to an attempt to swim, the complaint may be regarded as a complaint that the council failed to prevent him from becoming a trespasser. But this must necessarily, in my view, have been a duty owed to him while he was a visitor.
90 An analogous situation might arise in relation to the trees in the park. Suppose there were notices forbidding the climbing of trees. None the less a visitor to the park climbs a tree, falls from it, injures himself and sues the council. He would have been a trespasser vis-à-vis the tree. But a claim under the 1984 Act would be hopeless. The proposition that the council owed him a duty to make the tree easier or safer to climb would be ridiculous. But the injured climber might contend that the presence of the tree posed an enticing, exciting and irresistible challenge to those visitors to the park who, like himself, were addicted to the adrenalin surge caused by climbing high trees and that, consequently, the council owed a duty to make it impossible for him, and others like him, to succumb to the temptation, to prevent him from becoming a trespasser vis-à-vis the tree. This duty, if it were owed at all, would be a duty owed to him, a visitor, under the 1957 Act. The contention would, of course, be rejected. The council's 1957 Act duty of care to its visitors would not require the trees to be cut down or the trunks and lower branches to be festooned with barbed wire in order to prevent visitors to the park from disobeying the notices and turning themselves into trespassers by climbing the trees. For present purposes, however, the point I want to make is that the climber's contention would engage the 1957 Act, not the 1984 Act.
91 In the present case it seems to me unreal to regard Mr Tomlinson's injury as having been caused while he was a trespasser. His complaint, rejected by the trial judge but accepted by the majority in the Court of Appeal, was that the council ought to have taken

effective steps to discourage entry by visitors into the waters of the lake. The notices were held to be inadequate discouragement. But, if there was this duty, it was a duty owed to visitors. The people who read the notices, or who could have read them but failed to do so, would have been visitors. These were the people to be discouraged. The alleged duty was a 1957 Act duty. *99

92 The council's duty under the 1957 Act to its visitors was a duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted ... to be there": section 2(2). The purpose for which visitors were invited or permitted to be in the park was general recreation. This included paddling and playing about in the water. The proposition that in order to discharge their 1957 Act duty to visitors the council had to discourage them from any entry into the water and, in effect, to prevent the paddling and playing about that so many had for so long enjoyed is, in my opinion, for the reasons so cogently expressed by Lord Hoffmann, wholly unacceptable. There was no breach by the council of its 1957 Act duty. The question whether it owed any 1984 Act duty did not, in my opinion, arise. If, wrongly in my opinion, the 1984 Act were to be regarded as applicable, the case would be a fortiori.

93 There are two respects, in my opinion, in which the approach of the courts below to the facts of this case has been somewhat unreal. First, the action of Mr Tomlinson that brought about his tragic injury has been described as a "dive ". I think it is misdescribed. A dive into water, as normally understood, involves a hands-arms-head-first movement from a standpoint above the water down into the water. A dive is dangerous if the depth of the water is unknown for the obvious reason that if the depth is inadequate the head may strike the bottom of the pool or the lake before the diver is able to check his downwards trajectory and curve out of the dive. There had, apparently, been two previous occasions over the past five years or so on which a person diving into the lake had suffered head injuries. The evidence did not disclose the details but it seems reasonable to assume that these occasions had involved dives properly so-called. Mr Tomlinson did not execute a dive in the ordinary sense. He ran into the lake and, when he thought he was far enough in to do so, he threw himself forward. His forward plunge may, for want of a better word, be called a "dive " but it should not be confused with the normal and usual dive. Mr Tomlinson was not diving from a standpoint above the lake down into water of uncertain depth. His feet were on the bottom of the lake immediately before he executed his forward plunge. He knew how deep the water was when he began the plunge. He must have expected the downward shelving of the bottom of the lake to continue and there is no evidence that it did not. The accident happened because the trajectory of his forward plunge was not sufficiently shallow. This was not a diving accident in the ordinary sense and there was no evidence that an accident caused in the manner in which Mr Tomlinson's was caused had ever previously occurred at the lake.

94 Second, much was made of the trial judge's finding that the dangers of diving or swimming in the lake were obvious, at least to adults. No one has contested that finding of fact. But I think its importance has been overstated. Mr Tomlinson was not diving in the normal sense, nor was he swimming. He simply ran into the water and when he could not run any further, because the water was above his knees and the galloping action that we all adopt when running into water on a shelving beach had become too difficult, he plunged forward. This is something that happens on every beach in every country in the

world, temperature and conditions permitting. **100* Mr Tomlinson would not have stopped to think about the dangers of swimming or diving in the lake. He was not taking a premeditated risk. It would not have occurred to him, if he had thought about it, that he was taking a risk at all. He was a high-spirited young man enjoying himself with his friends in a pleasant park with a pleasant water facility. If he had set out to swim across the lake, it might have been relevant to speak of his taking an obvious risk. If he had climbed a tree with branches overhanging the lake and had dived from a branch into the water he would have been courting an obvious danger. But he was not doing any such thing. He was simply sporting about in the water with his friends, giving free rein to his exuberance. And why not? And why 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 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. This appeal must be allowed.

Appeal allowed and cross-appeal dismissed with costs to be paid out of Community Legal Service Fund.