Visitor Safety in the Countryside Group

Brereton Heath Country Park Case

An attractive lake bordered by sandy beaches forms the centrepiece to Brereton Heath Country Park in Cheshire. Families visit the park to play on the beach. It was common for people to swim in the lake, ignoring the Council's "no swimming" signs and the advice of park rangers.

Mr Tomlinson ran into the water up to his knees and plunged forward. He struck his head on the sandy bottom of the lake, breaking his neck, and was rendered tetraplegic.

The case examined the liability of the Council under OLA57 and 84 in respect of dangers due to the state of the premises or things done or omitted to be done on them.

The judges 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. It seems 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.

Lord Hoffmann observed:

> "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."

Even if the risk had been attributable to the state of the premises 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.

It is necessary to take into account the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming.

> "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."

There is also the question of whether the council should be entitled to allow people of full capacity to decide for themselves whether to take the risk. Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk.

Lord Hoffmann's opinion is that

> "it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. 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."

> "…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 order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious."

Tomlinson v Congleton BC [2004] 1 AC 46

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