In the 1988 case Lord Bridge ended by saying "... whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases." Their Lordships in *Fairchild* seem to disagree with him on this, too.

TONY WEIR

OCCUPIERS' LIABILITY: UNHEEDED WARNINGS

Is there a difference between the duty of care owed by an occupier to a trespasser under the Occupiers' Liability Act 1984 and that owed to a lawful visitor under the Occupiers' Liability Act 1957, as far as personal injuries are concerned? Not really, in the light of *Tomlinson* v. *Congleton Borough Council* [2002] EWCA Civ 309, where the Court of Appeal (Ward and Sedley L.JJ., Longmore L.J. dissenting) held the defendant Council liable for spinal injuries sustained by an 18-year-old who dived into the Council's lake, having seen one or more notices reading "DANGEROUS WATER: NO SWIMMING", and hit his head on the bottom. His damages were reduced by two-thirds for contributory negligence.

The lake in the centre of Brereton Heath Park was admitted by the Council to be a magnet to the public in hot weather. There were attractive sandy beaches where people picnicked (as lawful visitors), and sometimes as many as 100 at a time swam or ventured out in rubber boats. Over the years, several swimmers got into difficulties, and the Council was so concerned about the risks that as well as posting the notices, which were generally ignored, it employed rangers to give oral warnings and hand out leaflets explaining the risks of cold water, weeds, waterborne diseases and other hazards; the rangers' efforts met with little success and sometimes with abuse. In desperation, the Council decided to cover the beaches with soil and plant reeds at the water margin, but the planting was deferred because of financial constraints and had only just been started when the claimant's accident occurred.

At first instance Jack J., who dismissed the claim, held that the claimant became a trespasser when he entered the water, and this was conceded by the claimant on appeal (although, as Longmore L.J. pointed out, it is difficult to say whether such a transformation took place when an intending swimmer started to paddle or only on accomplishing some greater degree of immersion). This finding

made the 1984 Act, rather than the 1957 Act, applicable, and it was therefore necessary to show that the three conditions laid down in section 1(3) for the existence of a duty had been satisfied. There was no doubt about the first two: the Council was aware of the "danger" (identified by Ward L.J. as the risk of injury through drowning or through diving) and knew or had reasonable grounds to believe that the claimant—or someone like him—would come into the vicinity of the danger. Jack J. and the Court of Appeal held that the third was also satisfied: the risk was "one against which, in all the circumstances of the case, [the occupier] may reasonably be expected to offer the other some protection". The crucial issues were therefore: (i) whether the Council had come up to the standard of care prescribed in section 1(4)—"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"; (ii) whether the warnings were sufficient to amount to a discharge of duty under section 1(5); and (iii) whether the risk had been "willingly accepted as his" by the claimant under section 1(6).

The Court of Appeal held that there was no willing acceptance of risk because the claimant "did not know that the water where he dived was so shallow and the dive he made so steep that he would be injured", in contrast with *Ratcliff* v. *McConnell* [1999] 1 W.L.R. 670, where the claim of an inebriated student who made a similar miscalculation in a swimming-pool was defeated by section 1(6)—but then swimming-pools always have hard bottoms. What about the warnings? Jack J. held that they were sufficient to amount to a discharge of the Council's duty, but the majority of the Court of Appeal considered that they were not because they were so frequently ignored. This might be a persuasive argument in relation to the duty under the 1957 Act, where a warning only amounts to a discharge of duty if it is "enough to enable the visitor to be reasonably safe" (section 2(4)(*a*)), but section 1(5) of the 1984 Act provides that the duty may 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*" (emphasis added). Yet the notices and the efforts of the rangers were held to be insufficiently discouraging, given that, in Ward L.J.'s view, the Council was "inviting public use of this amenity knowing that the water was a siren call strong enough to turn stout men's minds".

So what ought the Council to have done? Reiterating Lord Steyn's warning in *Jolley* v. *Sutton LBC* [2000] 1 W.L.R. 1082, 1089 that "the results of decided cases are inevitably very fact-sensitive",

Ward L.J. gave a non-exhaustive list of facts and circumstances to be taken into account when deciding whether the duty had been discharged, including "the cost of taking precautions balanced against the gravity of the risks of injury"; this suggests that the standard is an objective one, and that the 1984 Act did not codify *British Railways Board* v. *Herrington* [1972] A.C. 877 in so far as that decision permitted consideration of a *particular* occupier's financial position in determining whether he had discharged his duty to a trespasser. Admittedly the £15,000 estimated cost of deterrent planting was not very great, but Congleton Borough Council doubtless had many other demands on its resources. The likely response of public authorities to this nannyish decision (which appears to be the first successful claim by an adult under the 1984 Act) will be to fence off any open stretches of water on their properties, thereby denying access altogether to those who merely wish to picnic or dip their toes in the water.

C.A. Hopkins

DISHONEST ASSISTANCE: GUILTY CONDUCT OR A GUILTY MIND?

Chancery lawyers have for many years awaited a definitive House of Lords ruling on the mental element required to make strangers to a trust liable for knowing or dishonest assistance in a breach of trust, and for knowing receipt of trust property. The appeal in *Twinsectra Ltd.* v. *Yardley* [2002] UKHL 12, [2002] 2 All E.R. 377 provided the opportunity for resolution of the issue in the former case but not the latter; the degree of knowledge required for a knowing receipt claim remains for final determination on another occasion.

The detailed facts of the case need not detain us unduly. Yardley was a businessman described by Lord Millett as "an entrepreneur with a number of irons in the fire" (para. [54]), and one major area of his activity was property development. Yardley negotiated a short-term loan of £1 million from Twinsectra Ltd. which, it was explicitly stated in the loan agreement, was to be used solely for the acquisition of property and for no other purpose. The defendant, Leach, was Yardley's solicitor. Leach secured the release of the loan funds to himself and subsequently paid them out to Yardley without taking steps to ensure that the money would be spent in the way specified. In the event some £357,000 was misapplied by Yardley (being utilised to pay off existing debts rather than for the purchase of property) and became irrecoverable.