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Based on the recent Hampstead Ponds swimming case **Michael Appleby** asks if it is enforcement of the Health and Safety at Work Act itself that is contributing to the growing tendency towards risk aversion.

Swimming against the tide

SECTION 3 OF THE HSWA 1974

Illustration by Arthur Phillips

We have all read newspaper stories about how the so called 'compensation culture' in the UK is causing organisations to be over cautious about health and safety risks. But what about the enforcement of the Health and Safety at Work, etc. Act 1974? Is this also contributing to a fear of risk? A recent court action, reported in last month's SHP (News), suggests this might be so.

Some of the ponds at Hampstead Heath, run by the Corporation of London, are used for swimming. They are open only when attended by lifeguards. Changes to the opening times meant swimmers could no longer have an early-morning dip before going to work.

The Hampstead Health Winter Swimming Club approached the Corporation to allow 'self-regulated' swimming outside opening hours for a controlled group, which would look after its own accident insurance. Negotiations floundered when the Corporation received legal advice saying if a swimmer was injured when there were no lifeguards, the Corporation might be prosecuted for a breach of section 3 of the HSWA. This requires an organisation to conduct its 'undertaking' to ensure, so far as is reasonably practicable, the health and safety of non-employees.

When approached by the Club, the Health and Safety Executive advised that the management of the ponds formed part of the Corporation's undertaking and so section 3 of the HSWA applied. It added that while lifeguards were not a legal requirement, HSE guidance recommend their use. As such, it could not rule out a future prosecution.

The Corporation consequently refused the request and the Club sought a judicial review of the decision in the High Court, where Mr Justice Burnton had to consider the application of the HSWA. The HSE was joined as an 'interested party' to the proceedings but refused to appear, writing to the court it was "mindful of the need to avoid unnecessary public expense".

Central to the arguments was the case of *Tomlinson* v *Congleton Borough Council* [2004] 1 AC 46. On a hot day, Mr Tomlinson went into a lake owned by the Council, and, from a standing position in shallow water, dived and struck his head on the bottom, breaking his neck. There were signs at the lake saying 'Dangerous water: no swimming'.

He claimed compensation, saying the Council had breached its duty of care under the Occupiers' Liability Act 1984. The House of Lords rejected the claim, saying the Act did not apply because the risk arose not from the condition of the premises (the lake) but what Mr Tomlinson chose to do.

Mr Justice Burnton accepted section 3 of the HSWA applied but said the exposure to risk should be subject to the same considerations as in the *Tomlinson* case, even though this concerned civil law and not criminal law. He ruled that, providing there were no hidden dangers in the pool, if a person chooses to swim when the pool is unsupervised then the risks they incur are from their own decision, not the condition of the pond, for which the Corporation could not be criminally responsible.

Arguably, legal gymnastics were performed to achieve a common-sense result. However, supposing cutbacks resulted in the Corporation being unable to provide lifeguards at all? Could it rely on this judgement if prosecuted?

Although this case may be seen as a 'one-off', it does give rise to wider questions as to how and when the Health and Safety at Work Act should be applied, and who has the responsibility for certain risks. In those circumstances it is disappointing that the HSE did not think it necessary to join the debate before the court. ■