



Neutral Citation Number: [2011] EWHC 2004 (QB)

Case No: HQ09X03102

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 03/08/2011

**Before :**

**MRS JUSTICE THIRLWALL DBE**

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**Between :**

**Kylie Grimes**

**Claimant**

**- and -**

**(1) David Hawkins**

**First Defendant**

**(2) Frimley Park Hospital NHS Foundation Trust**

**Second Defendant**

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**Philip Mott QC (instructed by Stewarts Law LLP) for the Claimant**  
**William Norris QC (instructed by Weightmans LLP) for the First Defendant**

Hearing dates: 5<sup>th</sup>, 6<sup>th</sup> and 10<sup>th</sup> May

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**MRS JUSTICE THIRLWALL DBE**

**Mrs Justice Thirlwall DBE :**

1. In the early hours of 5th August 2006 Kylie Grimes sustained serious injuries when she dived into a swimming pool at the home of David Hawkins in Farnham Surrey. It is her case that the injury to her cervical spine was aggravated by negligent treatment she received that morning at Frimley Park Hospital.
2. At the time of the incident with which I am concerned Miss Grimes was 18 years old. She was healthy, athletic and a keen sportswoman. She was working full time at a local stables. She was a very competent horsewoman. She is now 23. As a result of the injuries she sustained that day she is tetraplegic. Her mobility is hugely compromised. She uses a wheelchair. The impact on her life of the events of that night has been catastrophic. She is an impressive and courageous young woman. She conducted herself with great dignity throughout the trial.
3. In November 2009 the claimant issued proceedings against Mr Hawkins, first defendant and against the hospital, second defendant. The hospital has admitted breach of duty but denies causation. The first defendant denies liability. A trial of the issue of the liability of the first defendant was ordered in July 2010. It took place before me in May 2011. I reserved judgment.
4. The claimant puts her case against the first defendant in two ways: -
  - i) the defendant was in breach of his duty to her under Section 2(1) of the Occupiers Liability Act 1957.
  - ii) the defendant either by himself or through his daughter, Katie Hawkins, was in breach of a common law duty of care he owed to the claimant.

**THE EVIDENCE**

5. In addition to the claimant, Nathalie Wheeler, Kirstie Wiseman and Charlotte Cooke gave evidence on her behalf. The claimant's mother, Mrs McGee, gave evidence on one short point.
6. In addition to the first defendant, Miss Hawkins gave evidence on his behalf, as did Sophia Evans, Oliver Impey, Richard Collins, Thomas Brown and Scarlett Franckel-Martin. By agreement I read statements from others who were at the first defendant's house when the claimant was injured. All had attended to give evidence. There was a Civil Evidence Act notice in respect of various statements from Stephen Castle who was not called. I read his statements. They were inconsistent and I have given them limited weight.
7. A number of the defendant's witnesses seemed to regard the trial as something of a social event or entertainment. They are now, at youngest, 23. Some are older. They conducted themselves like badly behaved young teenagers. I make some allowance for nerves, while noting that the claimant and her witnesses behaved entirely appropriately throughout the trial, and they are the same age. Their behaviour gave me some insight into their likely conduct on the evening of the 4<sup>th</sup>/5<sup>th</sup> August when they were 5 years younger and in drink.

8. Miss Hawkins struck me as rather young for her years. She did however conduct herself appropriately during the trial.
9. I heard from two experts in pool safety: Mr Andrew Petherick on behalf of the claimant and Mrs Linda Myhill on behalf of the defendant.

## **THE BACKGROUND**

10. Some of the facts are not in dispute.
11. The first defendant's house in Farnham, Surrey, is large, surrounded by extensive gardens. The swimming pool is housed in a separate building which is never locked. The whole property is surrounded by a 7 foot high fence. The gates are electric.
12. The dimensions of the pool are: length 9099mms; width 4515mms (approximately 30 feet x 15 feet); with a minimum depth of 880mms (34.6 inches) and maximum depth of 1720mms (67.7 inches). The deep end occupies 1.83 metres (approximately 60 inches) at the end of the pool. The shallow end occupies 2.68 metres at the opposite end. Between those two points the floor slopes gently between 880mm and 1720mm. There are no depth markings on the pool. There are no signs warning against diving (or anything else). Mr Hawkins told me that diving is not prohibited in the pool. He taught his daughters to dive there and, although he does not regularly dive into it, he has done so and is content that others should do so.
13. The pool is heated. There is a pool cover which is pulled onto the pool from the roller at the deep end. Its purpose is to keep the heat in. It is rolled back when the pool is to be used. There are dehumidifiers on the wall of the pool house. They are controlled, as are the lights, by switches in the plant room which is in a small outbuilding near the pool house. There are 4 lights on the internal walls of the pool house and one light in the pool itself, below the water line. The pool was well maintained and regularly cleaned.
14. On the night of the 4<sup>th</sup>/5<sup>th</sup> August the defendant and his wife were away for the night, as was their older daughter. They had left Miss Hawkins, their younger daughter, at home. She was the same age as the claimant, 18. Her parents had agreed that she could have two friends to stay overnight, since she did not like being in the house on her own at night. During the evening of the 4<sup>th</sup> August she telephoned her father and asked if she could have 2 more people to stay. Her father agreed.
15. At the time of this incident the claimant was friendly with Miss Hawkins. They were not close but knew each other through the college they both attended. On the evening of 4th August they were both in the Hog's Head Public House in Farnham as were a number of other young men and women of about the same age, most of whom had been students at the college. This was a regular meeting place for the young people on a Friday evening. Some of them were driving so they did not drink very much, if any, alcohol. The rest were drinking alcohol of various types in varying amounts.

16. Miss Hawkins said that she had drunk half a bottle of wine and several vodkas and lemonades during the course of the evening at the pub. She was, she says, tipsy but not drunk. The claimant said she had drunk 3 or 4 small glasses of wine. She was not drunk. I accept her evidence about that.
17. I turn now to issues of fact which are in dispute.

**Was the claimant invited to the first defendant's home?**

18. The claimant said that during the course of the evening she and her friend Kirstie realised that Miss Hawkins was arranging for people to go back to her house as her parents were away. The claimant said that a lot of people were invited. Although she and Miss Wiseman were not initially invited they asked Miss Hawkins if they could come. According to them she said yes. Nathalie Wheeler gave them a lift to the house.
19. Miss Hawkins denied inviting the claimant and Miss Wiseman to her house. She says she only invited 5 people and everyone else just turned up. In cross examination she said "I didn't know that they were all coming". I reject that. She had telephoned at least one person who was not in the pub and invited him to come to her house. Other witnesses (more than 5) say they were invited. Nathalie Wheeler said in her witness statement that when she had first driven back to the house Miss Hawkins asked her to go back to the pub to ferry other people to the house. Miss Wheeler agreed to do that and made at least 2 return trips. She collected Miss Wiseman and the claimant from the pub on her last trip. Miss Wheeler was not challenged about that. It is consistent with the claimant's account and with the account given by Miss Wiseman.
20. I find that the claimant was an invited guest at a gathering of about 20 young people who arrived at the house from about around midnight. The claimant and Miss Wiseman were among the last to arrive. There was, in Miss Hawkins' words, "a party atmosphere".

**Was the claimant permitted to use the pool?**

21. Miss Hawkins said she did not tell people that they could use the pool. Someone went into the pool house and rolled back the cover without her knowledge. Even if that is right (and I doubt it) she certainly did not tell her friends that they should not use the pool. On the contrary she provided swimwear so that people could go swimming. That is entirely consistent with inviting, and at the very least permitting, her guests to use the pool if they wanted to. She did not tell anyone not to dive.
22. Miss Hawkins gave the claimant a bikini top and jogging bottoms to swim in. I am quite satisfied that she was permitted to use the pool.

23. A number of the young people who were there that evening have pools in their own homes. Several of them had visited the Hawkins pool before. The claimant had not but she had visited a number of other houses with indoor swimming pools and she had swum in them without incident. She is an accomplished swimmer with a number of qualifications.

**Were the lights on in the pool house and in the pool?**

24. In her statement Ms Wiseman, the claimant's closest friend, said that the pool was "quite dimly lit although there were lights on although I do not recall which lights were on in the pool room". In her witness statement the claimant said that the lights were on in the pool house but she did not think the light in the pool itself was on as she remembered that the visibility in the pool was poor. In cross examination she said that the lights were not nearly as bright as they appear in the photographs. That may well be true. The claimant went further when pressed in cross examination. She said she did not think the lights were on. I do not think she is right about that although I accept she believes it to be the case. I am satisfied that had it been the case she would have said so at the time of her witness statement.
25. Miss Hawkins said she had gone into the plant room and switched on the lights for the pool and pool house. I accept her evidence about that. She had invited people home, she was allowing them to use the pool. She had provided swimming clothes. I am satisfied that she would have switched on the lights as a matter of course. I find that she switched on the pool light and the 4 wall lights.
26. Miss Hawkins said she did not switch on the dehumidifiers. Ms Evans said it was humid, Mr Impey said it was steamy. Ms Wiseman said that it was very steamy, as did the claimant. I have no doubt that there was steam in the atmosphere. I do not think that it made a significant difference to visibility within the pool house. Those who were in the pool and on the side of the pool could clearly see and recognise others who were there. Those who were outside on the patio could see into the pool house. Those who were in the pool could see their surroundings clearly enough.
27. Not all the guests went into the pool house, still less the pool. Nor did those who used it all go in at the same time. There were probably about 6 or 7 in or around the pool at any one time, as people came and went.
28. It is not in dispute that a number of young men, were jumping over the pool cover roller at the deep end of the pool and into the water. Others (young men and women) were jumping in from the sides. Some were "bombing" – jumping in with their legs tucked into their bodies, with their arms around their shins. Inevitably, when people were jumping and bombing, the surface of the water was agitated, particularly at the point at which they entered the water, rippling out thereafter. One of the young men recognised this was potentially dangerous, given that they had been drinking but he did it anyway. Steve Castle says he dived in from time to time. He stubbed his toe at some point and got out of the pool.

29. The claimant jumped into the pool by the steps at the shallow end. She said she was in the pool for about half an hour, mostly swimming around, sometimes chatting with friends, standing in the shallow end. She knew where the deep end was.
30. Mr Norris submitted that the claimant had adjusted her evidence about how she spent her time in the pool to assist her case. In her statement she said “I initially jumped into the pool from the steps in the shallow end and spent about 30 minutes swimming in the pool. During this time I stood up in the shallow end and chatted and watched a number of the people jumping into the water and swimming. Everyone was generally splashing around and there was some “bombing” going on in the swimming pool”. It was submitted that the obvious inference to be drawn from that was that the claimant had swum all around the pool. Whilst that is a perfectly reasonable inference, what the claimant said in oral evidence is not inconsistent with her statement.
31. Sophia Evans says that the claimant was swimming lengths of the pool and that she jumped in several times (which she later modified to say that it may only have been twice). I do not accept her evidence about that. Miss Evans is a close friend of Miss Hawkins. It was my impression that she was determined to put Miss Hawkins in the right and the claimant in the wrong hence her rather assertive manner and her haste to interrupt Mr Mott when he was cross examining her. It is likely that loyalty to Miss Hawkins has caused her to embellish her own recollection.
32. I accept that the claimant was in the pool for about half an hour as she says. I accept that she jumped in once. I accept that she was swimming around. I find that she did swim towards the deep end but I accept that she did not swim in the deepest part of the pool (i.e. the last six feet) probably because that was where people were “bombing” at that time.
33. I have no doubt that for some of the time the water was agitated as people jumped in. However during a thirty minute swim in the pool, even allowing for time spent standing still and chatting there was plenty of opportunity for the claimant to observe the contour of the bottom of the pool. Even when the water was agitated the bottom was still visible. Whilst the precise depth may not have been clear at all times the fact of a slope certainly was, as was the existence of a deep end and the point at which it started.
34. Richard Collins said he had seen the claimant dive into the pool from the shallow end on a number of occasions, coming up in the middle of the pool. He also said that when the ambulance men arrived they made the claimant stand up and walk down some steps. He thought they should have kept her flat. He is right about that and I find that they did keep her flat. That is what the other witnesses say, including the claimant. That is such a significant and plain error that I cannot rely on what Mr Collins says about the claimant repeatedly diving. Miss Hawkins said in her original statement that she had not seen the claimant dive into the pool at any stage. She said in a later statement that she had. I do not accept that her memory about something so important would be better at a later date than it was at the time the defence was drafted. I reject her evidence about that. The claimant says she dived in only once. I accept her evidence about that.

**From where did the claimant dive?**

35. It is the claimant's case that she dived from the long side, half way down the pool. She had her back to the pool house doors and windows. She dived diagonally, she recalls, towards the deep end. She assumed it would be safe to do so. She executed a shallow racing dive. Almost immediately she collided with the bottom of the pool.
36. It is the defendant's case that the claimant dived from the shallow end i.e. from the side of the pool that runs the width of the shallow end.
37. Although various people had given different accounts it was plain by the end of the trial that no one saw the claimant dive in. A number of witnesses had seen her standing talking to Steve Castle at the side of the pool at the shallow end. She accepts she did that. It is also plain on his evidence that he left the pool house a few seconds before she dived in, giving her time to walk along the long side of the pool, as she said she did. She recalls walking away to put down a towel before diving in. Either way the evidence in respect of her conversation with Steve Castle is consistent with the claimant's case, as well as the defendant's.
38. Nathalie Wheeler wrote a witness statement at the request of the claimant's solicitors in October 2007. She wrote that she had seen the claimant before she dived into the pool. She marked the spot where she had seen her about half way down the long side of the pool. In evidence Miss Wheeler said that in fact the claimant was further up, towards the shallow end and that her original plan was not quite right. In her witness statement dated October 2010 prepared on behalf of the defendant she said that she saw the claimant at the shallow end (i.e. outside the pool on the short side) and that she did not see her again until she was in the water. I think it is likely that her recollection in October 2007 was better than it is now or than it was in October 2010.
39. Charlotte Cooke was in the pool, chatting with Scarlett Franckel-Martin. Ms Cooke thought that they were roughly half way along the long side of the pool, near the brick wall i.e. on the opposite side from the doors. She marked her position on a photograph. It is towards the half way point along the long side of the pool, but nearer the shallow end. Ms Franckel-Martin gave evidence on behalf of the defendant. She said that the original mark she had made on a photograph to indicate her position in the pool was not correct and that she was standing much nearer the shallow end. I am satisfied that the marking she made nearer the time was likely to be more accurate. I find therefore that Ms Cooke is correct and that she and Ms Franckel-Martin were roughly half way down the pool, but nearer to the shallow end. They were positioned towards the brick wall on the side opposite to the side from which the claimant dived.
40. Ms Franckel-Martin had her back to the doors, Ms Cooke faced them. Ms Franckel-Martin thought that she was not standing, but was probably floating or bobbing up and down in the water. In her witness statement she had said that she was standing on the bottom. Either way there is no reliable evidence that the two young women were standing still, nor what the height of the water was against their bodies.

41. Miss Cooke was aware of the claimant in her eye line. She had seen her, moments before, chatting to Stephen Castle. She saw her immediately before she dived and just after but she did not see her dive. She recalled that the claimant was about half way along the pool too, on the side nearest the doors.
42. I am satisfied on the evidence of Ms Cooke, Ms Frankel Martin and the claimant that the claimant walked a few paces from the shallow end along the long side of the pool, towards the middle. She dived in diagonally from a point nearer to the edge of the pool at the shallow end than the edge of the pool at the deep end. In the light of my findings as to her earlier exploration of the pool I am satisfied that she dived into an area in which she had previously swum.
43. Although the claimant intended to execute a shallow racing dive, I am satisfied that the dive was steeper than she intended. That is supported by the position in which she ended up, near Ms Cooke and Ms Franckel-Martin, and by the fact that she hit the bottom of the pool almost immediately.
44. Miss Cooke was aware that the claimant had dived in and saw her come to the surface. The claimant immediately said that she was hurt, her legs were not working properly and she needed to be kept still. The witnesses who were in the pool all describe her as coming to the surface near the middle of the pool.
45. It is difficult to overstate the remarkable calm and maturity the claimant displayed. She knew immediately that she had injured her neck. She was determined that her friends should keep her still. She gave instructions to them all throughout as to how she should be looked after. She insisted no one should try and move her. She asked for an ambulance to be called.
46. There was some suggestion that Kirstie Wiseman had said that she was probably just attention seeking, and to take no notice. Ms Wiseman denies saying such a thing. The fact that she did was relied on by Mr Norris as a reason why she may now be lying to try and assist her friend. I reject that submission; Ms Wiseman is a close friend of the claimant. Had she intended to assist the claimant she had reason enough to do so irrespective of this matter. Whether or not she thought her friend was attention seeking is irrelevant to the issues I have to determine. I record my finding that there could have been nothing less attention seeking than the claimant's conduct. She was calm, collected and sensible. She was plainly not drunk and her judgement was not impaired.
47. An ambulance duly arrived. The claimant was transferred onto a stretcher and taken to hospital.
48. In cross examination the claimant accepted that she knew it was dangerous to dive into shallow water but denied that she had done so. She knew, she said, that it was dangerous to dive where the water depth is unknown. The obvious danger, as she recognised, was the risk of hitting her head. She did not need to be told that, she had known it for years. She was a very competent swimmer with a number of qualifications. She knew how to dive.

49. She said, quite reasonably, that she would have expected to be warned of any hidden dangers in the pool, and she would have heeded any such warnings. She said if Katie Hawkins had told her not to dive she would not have done so.

### **The Expert Evidence**

50. On behalf of the claimant I heard from Mr Andrew Petherick. He is an expert in Health and Safety, particularly with regard to sport. He is experienced in the design, development and management of sport facilities. He has extensive knowledge of swimming pool management and design. He is a qualified tutor examiner in a number of sports and an experienced expert witness.
51. On behalf of the defendant I heard from Mrs Linda Myhill. Now retired, she worked for many years in the sport and leisure industry. She has over 30 years experience in the management and operation of sport and leisure facilities including swimming pools. All her experience is in the public and/or commercial sector.
52. The experts agree that there are no regulations in respect of private swimming pools.
53. There are some national standards which apply, generally, to public and commercial pools. These derive from a document produced by the Institute of Sport and Recreation Management ISRM. I was shown the 2001 version of the guidance which is an updated version of a document first produced in 1998 "Diving in Swimming Pools". It was produced after consultation with a range of organisations whose focus is sport, Health and Safety or both.
54. Until 1998 diving was traditionally permitted in the shallow end of swimming pools (i.e. around 0.9 to 1m depth of water). According to those who produce the ISRM document there were very few diving accidents, presumably because divers were cautious when diving into shallow water.
55. The 2001 document asserts that the courts have taken the 1998 document as a benchmark in establishing liability in diving accident cases. The 2001 document, like its predecessor, provides guidance for operators of swimming pool facilities "where diving and feet first entries may take place and for others concerned with the safety of diving facilities and activities". At paragraph 1.2.1 it identifies home pools as an area where the risk of danger is higher than in traditional public facilities. Later "A major aspect of the following recommendations is to encourage safe habits in public pools and other facilities where lifeguard surveillance and control is available, which will be carried into other swimming pools and areas where control and supervision may not exist".
56. The Health and Safety Executive drew on this document within its 2003 guidance document "managing health and safety in swimming pools". Again this is directed to commercial pool operators. The guidance as to depth and forward clearance is the same. Mr Petherick pointed to two relevant recommendations. The first is at 3.1.2 B "Diving should not be permitted into water with a vertical depth of less than 1.5m." The second relevant recommendation is at 3.1.3: "Diving should not be allowed in pools where there is a forward clearance of less

than 7.6m”. I note that nowhere in this pool was there a forward clearance of 7.6m or more. Mr Petherick pointed out that the guidance provides that diving into less than 1.5metres is allowed “under strictly controlled measures, such as race swimming by experienced participants”.

57. The recommendation for vertical depth is made for people of all heights. Someone of the claimant’s height would only need 134 cm depth of water whereas a person who is 6 feet tall would need 1.5m.
58. There are recommendations for warning notices and for advice notices setting out safe diving techniques, together with depth markings.
59. Mr Petherick referred to detailed guidance from the trade organisation for those who build swimming pools (SPATA).
60. The guidance suggests that a minimum safe depth for a swimming pool is 0.9m. This pool, at its shallowest, was just about that depth.
61. The guidance also recommends that diving should not be permitted unless there is a vertical depth of 1.5m or more. There is no recommendation for a minimum forward clearance in the SPATA guidelines.
62. Whilst Mr Petherick said that some private swimming pools have depth markings and “no diving” notices it is not in dispute that most of the many thousands of such pools have neither. Mrs Myhill would not expect such notices since in the domestic context guests can be verbally warned of any unexpected dangers. She did not accept however that there were any dangers which required warnings in this case.
63. Both experts agreed “that the general guidance from all bodies that issue any advice upon swimming pool safety is that the consumption of alcohol in connection with the use of swimming pools is not recommended...Common sense would in any case suggest that alcohol consumption affects judgement and the appreciation of risk”. This is entirely unsurprising.

## **The Law**

### **BREACH OF DUTY**

64. The Claim is brought both under the Occupiers’ Liability Act 1957 and in common law negligence. That approach is conventionally adopted where a claimant is injured on another’s premises. Often the two are not the subject of separate analysis see e.g. the decision of the Court of Appeal in **O’Shea v Royal Borough of Kingston Upon Thames [1995] PIQR, 1**, where the focus was on negligence (and contributory negligence) in a successful claim for damages brought by a young man who was injured when diving into a swimming pool run by the Local Authority. In this case the particulars of breach of the duty under the Occupier’s Liability Act and the duty of care at common law appear under a single heading “Particulars of Negligence”. The breaches alleged are common to the duty under the Act and at Common Law. The scope of the duty at Common

Law is not separately identified and during the trial it was not explored separately. The defence denies the existence of a duty of care at Common Law.

*Occupier's Liability Act 1957*

65. The relevant sections are:

1(1) *The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.*

...

2(1) *An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.*

2(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.*

2(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.*

2(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; ...*

2(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).*

66. The defendant admits he was the occupier and that the claimant was a visitor within the meaning of the Act. Thus he owed a duty to the claimant to take such

care as in all the circumstances of the case was reasonable to see that the claimant was reasonably safe in using the premises for the purposes for which she was invited or permitted by the occupier to be there.

### **The purpose for which the claimant was invited or permitted to be on the premises**

67. I have found that the claimant was invited to the defendant's home. I have found that she was (as a minimum) permitted to use the pool. In my judgment it follows that use of the pool was one of the purposes for which she was permitted to be on the premises.
68. Mr Norris submitted that whilst use of the pool could be a purpose, diving was not. He accepted that swimming in the pool could be a purpose. He submitted had there been a diving board then diving might have been a purpose. I do not accept that the absence of a board means that diving is excluded from the purpose for which the pool is to be used. When a person is permitted to use a pool and wishes to do so he has to get into it. Absent any express prohibition, the usual route is via the steps, a jump or a dive. That activity forms part of the use of the pool and the choice made by the pool user will be a matter of personal preference, informed no doubt by the design of the pool.
69. I am satisfied therefore that the defendant owed to the claimant a common duty of care while she was using the swimming pool, a purpose which included diving.

### **Breach of duty**

70. Mr Mott submits that the pool was not safe for diving for the following reasons:-
- i) the shape of the pool was such that there was a long slope down from the shallow end to the deep end, and the full depth at the deep end was present for only 1835 mms of the 9099 mm length of the pool (about 6 feet out of the 30 feet, or approximately 20% of the total length);
  - ii) that the pool was being used:
    - a. in the hours of darkness, with artificial illumination;
    - b. by a reasonably large number of people at once, so that the surface of the water would have been continually agitated;
    - c. by people who, like the claimant, had never been swimming in the pool before;
    - d. in a party atmosphere, by teenagers who had taken alcohol, so that the highly controlled circumstances envisaged by Mr Petherick could not be achieved.
  - iii) that there were no oral or written warnings or indications that diving was unsafe in any part of the pool, or of the depth contour of the pool;
  - iv) that the risk of an accident occurring with such a group in the pool in such circumstances was serious and obvious, and the consequences of a pool accident, especially a diving accident, could be catastrophic;
  - v) that it would have been easy:

- a. to instruct users of the pool that night that diving was unsafe, and/or to forbid the guests from diving; or
  - b. to lock up the pool house to prevent any access to the pool.
71. As a result, Mr Mott submits, there was a clear breach of the common law duty of care.
72. He further submits that this is not a case where the defence of willing acceptance of risk under Section 2(5) is of application. The claimant's case is that she assumed that it was safe to dive in because she had seen so many others jumping and "bombing" in the water. I think it most unlikely that the claimant made that assumption on the basis of seeing people jumping in and bombing. She had spent 30 minutes swimming around in the pool and had, I have found, ample opportunity to observe its contour.
73. I do not accept the assertion that it was impossible for the claimant to ascertain the depth of the water because of the amount of agitation. If that were the case I would be bound to find that the claimant dived in without any thought about the depth of the water. That is not my view.
74. The fact that the claimant executed the dive diagonally indicates that she had given some thought to the matter and did not think the water was deep enough immediately in front of her. She was right about that. She sought to reduce the risk by diving into deeper water. She was an accomplished swimmer. She knew how much water she needed to dive in. In my judgment either she misjudged the dive, or she misjudged the depth of the water, or she did both.
75. It is inescapable that had she dived into the pool from a point midway along the long side (as she believes she did), aiming diagonally for the far corner, the claimant would have entered the water at a point at which it was about 1.5m deep (see the evidence of Mr Petherick in cross examination). Although injury could not be entirely discounted, that should have been enough for her to execute the dive without injury.

## **Discussion**

76. There is always risk in swimming and diving, in any pool. Even where an expert diver dives into a purpose built diving pool his dive is not free from risk. Much depends on the diver's technique, the angle of entry and so on. It is well known that diving always carries with it a risk of injury (particularly to the head or neck) if the dive is badly executed, or carried out in water that is too shallow to accommodate it. None of this is specialist knowledge. Every adult of normal intelligence knows it. The claimant in this case knew it.
77. Mr Norris submits that the swimming pool was properly designed, competently built and well maintained. I accept that submission. This was, I find, an ordinary domestic swimming pool. There was nothing unusual about its shape, either above or below the water. It was well lit. There were no hidden hazards. The long slope from the shallow end to the deep end was not unusual in a domestic pool. It could clearly be seen. The fact that the deep end occupied only

one fifth of the length of the pool did not make the pool unsafe for diving nor did any of the other features I have identified.

78. It is not in dispute that people have dived into this pool over many years without mishap. Mr Petherick accepted that diving could take place safely in the pool in what he described as “closely controlled circumstances”. Mrs Myhill was of the view that the pool was safe for diving.
79. As a matter of fact the pool doors could not be locked, since there were no keys for the doors (nor had there ever been any). Given that the pool house was within a large garden with a high fence and electric gates there had never been any reason to lock them. Thus, on the claimant’s case, in order to discharge his duty of care the defendant would have had to declare the pool out of bounds and prevent his guests from using it.
80. On the claimant’s case any warnings (written or verbal) would have to be in uncompromising terms: “No Diving - in any circumstances.” Warnings such as “Don’t dive in shallow water” would add nothing to the knowledge of any adult of normal intelligence.
81. Mr Mott submits, correctly, that were this a public pool warning signs would be posted and life guards would have the task of enforcing the no diving policy. By the same token, as Mrs Myhill accepted, a small hotel, perhaps with a pool not much bigger than this one, would be expected to display warning signs so as to protect from injury those who may be unfamiliar with the pool’s layout and depth – and, probably, because it is a term of the Hotel’s Public Liability insurance policy. It does not mean that the hotel is under a duty to display such signs in order to discharge its duty under the Occupier’s Liability Act 1957.
82. Mr Norris relies on the decision of the House of Lords in **Tomlinson (FC) v Congleton Borough Council and Others [2003] UKHL 47**. There, the claimant had dived into a lake, which he knew well. His head collided with the sandy bottom of the lake and he suffered serious injuries. Although he was permitted to be in the lake, swimming (and therefore diving) in the lake was prohibited and his claim was ultimately before the court under the Occupiers Liability Act 1984. Lord Hoffman considered the case first on the basis of what the position would have been had the claimant been a lawful visitor to whom a duty was owed under section 2(2) of the 1957 Act. He placed particular weight on the importance of the exercise of 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] 2 WLR 1138 – 1153** 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, 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 6 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 foriori case.*

*45. I think it will be extremely rare for an occupier of land to be made 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 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.”*

83. Mr Mott argues that this authority and others which follow it in relation to trespassers are not authority for the proposition that the legal approach is identical under the 1957 Act and under the 1984 Act. I agree. He goes on to say that the result was the same in **Tomlinson** under the 1984 Act as it would have been under the 1957 Act because there is “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”- see Lord Hoffmann at paragraph 13. That is correct, but I cannot ignore what Lord Hoffman described at paragraph 44 as the central reasoning in the case, namely the freedom of an individual to exercise free will.
84. Mr Mott further submits that the claimant’s position is very different from **Tomlinson** where there were no hidden dangers and “the only risk was the inherent one in diving”. He refers to paragraph 27 of Lord Hoffman’s speech “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 of what he chose to do and not out of the state of the premises”. In my judgment the same applies here. I have found that there were no hidden or unexpected dangers. Furthermore I have found that the claimant had familiarised herself with the contours of the pool. The claimant’s position cannot be distinguished from that of Mr Tomlinson on that basis. The risk here was the risk inherent in diving.

## **Conclusion**

85. The pool was not unsafe for diving. I have no doubt that some mature adults faced with a group of young adults in high spirits, some of whom had had too much to drink, would send them all home rather than allow any of them into a swimming pool. But that is not to say that the duty owed to the claimant under the Occupier’s Liability Act 1957 required the defendant to put the pool out of

bounds that night. The defendant was not required to adopt a paternalistic approach to his visitors, all of whom were adults, all of whom were making choices about their behaviour, exercising their free will.

86. I do not accept that it is incumbent on a householder with a private swimming pool to prohibit adults from diving into an ordinary pool whose dimensions and contours can clearly be seen. It may well be different where there is some hidden or unexpected hazard but there was none here.
87. It follows that I find that the defendant was not in breach of his duty to the claimant under the Occupier's Liability Act 1957.

### **Duty of Care at common law**

88. Mr Mott submits that the defendant owed to the claimant a duty at common law. Although the scope of the duty is not described it is a duty that was said to be breached in the way set out in the particulars of negligence. It follows therefore that it was a duty to take reasonable steps to ensure that the claimant was reasonably safe when visiting his home as his guest, a duty that would be discharged by either i) putting the pool out of bounds and/or ii) forbidding diving in the pool. Alternatively it was a duty a) to put the pool out of bounds and b) to forbid diving in the pool. The differences matter not in this case, the breaches would be identical.
89. Mr Mott submits that the duty is established on an application of the three limbed test set out by the House of Lords in **Caparo Industries plc v Dickman [1990] 2 AC 605** (proximity, foreseeability of damage, fair just and reasonable). Mr Norris submits that the test is not met.
90. The duty contended for here is in practical terms identical to the duty, breach of which was considered by the Court of Appeal, in **O'Shea** to which I have referred above. In that case it seems to have been agreed that the council (who operated a leisure pool) owed to the claimant, a visitor to the pool, a duty at common law "to take such care as in all the circumstances of the case was reasonable to see that he would be reasonably safe in using the pool". The issue between the parties was breach. The court's conclusion is set out at page 6 "The arguments on behalf of Kingston are formidable but in the end I feel bound to reject them. Kingston knew that diving was inadvisable; their rules said so. In addition the instructions to the staff made clear that there were areas where diving was unsafe and types of dive that were unsafe and which should be prevented... I am satisfied that there was more than enough material on which the judge could conclude that the only safe system was to prohibit diving altogether." The court upheld a finding of 50% contributory negligence.
91. This was a public pool. It was plain that the council had (by the provision of lifeguards, and the instruction to them – which they did not implement - to prevent diving in certain places) assumed responsibility for the claimant's safety when using the pool.
92. In **Trustees of the Portsmouth Youth Activities Committee (A Charity) v Poppleton [2008] EWCA Civ 646** at first instance the claimant failed in his

claim under the Occupier's Liability Act 1957 but succeeded, in part, in his claim in Common Law negligence. He was a paying visitor to a climbing wall. He was very seriously injured when he misjudged a jump, fell and landed on his head on safety matting on the floor. The judge at first instance considered that the **Caparo** test had been met and imposed a duty upon the owners of an indoor climbing wall to warn the claimant that thick safety matting did not make a climbing wall safe. He found the defendant to be in breach of that duty and found the claimant 50% contributorily negligent. The Court of Appeal overturned his finding that there was a duty.

93. May LJ reviewed the authorities and, in particular, the policy considerations in **Tomlinson**. See paragraph 17:

“...the speech of Lord Hoffmann in [**Tomlinson v Congleton Borough Council**] has dicta relevant to policy considerations underlying the scope of duties which may be owed in cases such as this. Agreeing in paragraph 26 with the judgment of Lord Phillips of Worth Matravers MR in **Donoghue v Folkestone Properties Ltd** that Mr Tomlinson suffered his injury because he chose to indulge in activity which had inherent dangers, not because the premises were in a dangerous state, Lord Hoffman said at paragraph 27 that Mr Tomlinson was a person of full capacity voluntarily and without any pressure or inducement engaged in an activity which had an inherent risk. Lord Hoffman repeated, in paragraph 44 under the heading "free will", that Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. He then said in paragraph 45 that it would 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 chose to undertake. If people want to climb mountains, go hang gliding or swim or dive into ponds or lakes, that is their affair. The land owner may take a paternalistic view and prefer people not to undertake risky activities on his land. But the law does not require him to impose conditions. Lord Hoffmann then said at paragraph 46 that a duty to protect against obvious risk or self inflicted harm exists only in cases in which there is no genuine or informed choice. I add that a duty may also exist where the defendant has in some relevant way assumed responsibility for the claimant's safety, as in **Fowles v Bedfordshire County Council CA 17.5.95** - see especially Millett LJ at pages 20 to 24. The same may be said of **Perrett v Collins** and **Watson v British Board of Control [2001] PIQR 16**, in each of which the relevant defendant was exercising a degree of regulatory control. By contrast, in **Evans v Kosmar Village Holidays [2007] EWCA Civ 1003**, it was held, following the approach in **Tomlinson**, that the defendants' duty of care did not extend

to a duty to guard the claimant against the risk of diving into the pool and injuring himself. That was an obvious risk of which he was well aware.”

94. There is no separate analysis of the **Caparo** test but it is plain that (as a minimum) the claimant could not establish that it would be fair just and reasonable to impose a duty in that case. It is well recognised that the various limbs of the test overlap and in my judgment the absence of an assumption of responsibility would also have meant that there was an insufficiently proximate relationship between those running the premises and the claimant.
95. In this case there was no assumption of responsibility. The policy considerations that underpinned the decision in **Poppleton** have even greater force here where the claimant was a visitor to a private home.
96. I shall not repeat my earlier observations and conclusions as to paternalism. I apply the reasoning in **Poppleton** and **Tomlinson**. As Mr Norris submitted, the claimant was an adult. She did something which carried an obvious risk. She chose, voluntarily, to dive when, how and where she did, knowing the risks involved, as she acknowledged on the first day of the trial.
97. I am quite satisfied that (irrespective of the other limbs of the **Caparo** test to which I have only briefly alluded) it would not be fair just or reasonable to impose upon the defendant a duty of care to the claimant which required him to put his pool out of bounds at night, or to prohibit adults from diving into the pool.
98. Accordingly the claim in negligence also fails and the claim against the first defendant is dismissed.
99. I await submissions from Counsel on the form of the order. Should agreement be reached there is no need for counsel to attend when this judgment is handed down. I am content to consider any submissions in writing.