



Chair of the Wharfmeadows Action  
Group  
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17 April 2007

Dear Sir or Madam

**WHARFMEADOWS ACTION GROUP – “10 AREAS OF CONCERN FOR THE PEOPLE OF OTLEY”**

I refer to the above document which has come to the notice of senior members and Council officers. I thought it would be useful to prepare a response regarding the Council's legal position, as there appears to be some misunderstanding or misinterpretation by the public of that position.

I should emphasise that the Council does not intend to enter into further public debate about its understanding of the legal position. If your organisation, or any other person, wishes to take their own legal advice, that is entirely a matter for them.

The Council does not usually share legal advice it has obtained (as it is professionally privileged), but it is hoped that doing so on this occasion will assist. However, I must stress that it is not advice which has been obtained for any person or organisation other than the Council its members and officers.

The Council invites the Action Group to share this letter with those to whom the document may have been disseminated.

The Council will be receiving a deputation on the matter at the Council meeting on 18 April 2007, and a further report will be submitted to a future Executive Board meeting. Prior to the report to Executive Board, arrangements will be put in place to enable Otley residents to share with the Council any views they may have on any proposals which will by then have been formulated and shared publicly, so that the members of the Executive Board will have the benefit of residents' views when looking at this matter again. The report to the Executive Board will reflect the outcome of that exercise as well as a range of other matters including a further report from ROSPA following its review of its own input and further advice, the view of Council officers on that advice, legal advice etc.



This letter is not intended to pre-empt further consideration of such matters but to simply set out in general terms the legal position as the Council sees it as a result of legal advice including advice from leading Counsel who is a specialist in health and safety matters.

The starting point is the relevant legislation which I have set out at in Appendix 1 to this letter as it underpins a proper consideration of the legal position.

In summary, the Council is legally obliged to undertake a risk assessment and to take into account all relevant factors before deciding what action, if any, to take in relation to a particular site. The Tomlinson case, and other relevant cases, do not define what should happen in relation to **particular** stretches of water or the risks or otherwise in relation to such sites, nor does it create the law in relation to such sites. It merely applies the law in relation to a particular set of circumstances. In the circumstances of that case, the outcome was that the relevant Council was not liable and was found to have discharged its duty appropriately. If an unfortunate tragedy were to happen at Otley Wharfmeadows the same test would be applied to whatever circumstances presented at the time, and taking into account the assessment as to risks and the action taken in relation to them.

Further, the Compensation Act 2006 provides that a court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might:-

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity.

Following the unfortunate drownings in Roundhay Park Lake in 2005, the Council commissioned a report from ROSPA regarding safety in relation to areas of water for which the Council is responsible. That report focused on safety measures in place at Roundhay Park but it also addressed safety at other sites of "open water" for which the Council was responsible, including Otley Wharfmeadows. Certain recommendations were made to the Council's Executive Board on 9 February 2007 based on the advice of ROSPA and officers. The report to the Executive Board on 9 February 2007 followed a number of meetings of senior officers from a range of departments

The document prepared by the Action Group sets out a number of legal points including the claim that "ROSPA got the law wrong" and that "LCC has assumed that ROSPA got the law right."

It is not clear on what basis that assertion is made but the Council has made no such assumption and indeed it cannot even be said, in such blanket terms, that ROSPA "got the law wrong."

The document refers to a "House of Lords decision" without identifying a case but in public debate and from references to the individual Law Lords in the document it would appear that reference is being made to the case of **Tomlinson v Congleton Borough Council (2003) UKHL 47**. In that case the claimant "dived" into a flooded quarry having ignored the "no swimming" signs erected by the relevant Council. His action of 'diving' turned him from a 'visitor' into a 'trespasser'. He failed to establish liability under the Occupiers Liability Act

1984 for the injuries he sustained as a result (Lord Hoffman who gave the leading judgement of the appellate committee also considered that the claim would have failed under the Occupiers Liability Act 1957 as a “visitor”).

The decision in the Tomlinson case does not define Leeds City Council’s duties at Wharfmeadows Park Otley. The case was a decision on its own facts, dealing as it did with a trespasser who ignored the warnings not to swim in a quarry. Whilst deliberate and/or foolish access to a known and obvious hazard is still an issue at Wharfmeadows Park Otley e.g. crossing the weir, the most important issue is a far more “mainstream” issue for the Council, namely the duty of care that is owed to visitors where there may be careless or inadvertent access to the river e.g. the risk of the unwary pedestrian accidentally falling over the low wall that runs alongside the Wharf near to the weir.

Since the decision in Tomlinson there have been three further decisions which all follow on from it: **Maloney v Torfaen County Borough Council (2005) EWCA Civ1762; Keown v Coventry Health Care Trust (2006) EWCA39 and Clare v Perry (2005) EWCA Civ39.** These cases all involved “deliberate/foolish access” although in **Clare v Perry**, the Court of Appeal also made observations about the duty which is owed where the foreseeable risk was the risk of “accidental access”.

As regards the other points made, it will be appreciated on the basis of this letter that the Council does not agree with the other legal points made in the Action Group document.

As indicated above, the key to the matter is proper risk assessment taking everything into account. Legally, it is perfectly proper for the Council to revisit the risk assessment in the light of further advice from ROSPA as well as other considerations and hence, as indicated above, there is to be a further report to the Executive Board. It has been recognised that perhaps more could have been done at an earlier stage to inform interested parties of the way that the Council proposed to fulfil its statutory duties, but the legal position is that any “duty” to consult must be a very limited one in a situation where safety of the public is the overriding issue. The duty is to act not consult. However, as detailed above residents’ views will be sought before the matter goes to Executive Board for determination.

I trust that the above will be of some assistance to those who consider it.

Yours sincerely

**Nicole Jackson**  
**Assistant Chief Executive (Corporate Governance)**

Cc All members of the Council’s Executive Board  
Cllr R Downes, Ward Member for Otley and Yeadon  
Cllr G Kirkland, Ward Member for Otley and Yeadon  
Cllr C Campbell, Ward Member for Otley and Yeadon  
Mr Greg Mulholland MP

## Appendix 1

### **Relevant legislation**

The Council's basic legal duties are set out in the Occupiers' Liability Acts 1957 and 1984. The earlier Act deals with "visitors" and the later Act deals with "trespassers".

The Occupiers' Liability Act 1957 provides:-

- "(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 purpose for which he was 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 ordinarily would 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 the 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 or 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)".

The Occupiers Liability Act 1984 provides :

- "1(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 the sub-section (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 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 of 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).”