

Philadelphia

1. I live in a north London neighbourhood called Hampstead. At the time when people here in Philadelphia were absorbed in such matters as the Declaration of Independence, Hampstead was a village out in the Middlesex countryside, about 5 mile from Westminster, where Londoners went in coaches for entertainment and summer holidays. It was and remains popular with writers and artists; in the summer of 1819, Mr John Keats was living in the house more or less opposite where I live now, sitting under the cherry tree in the garden writing the Ode to a Nightingale and Mr John Constable was living a couple of hundred yards up the hill, setting up his easel on Hampstead Heath.

2. Today of course the great metropolis of London has swallowed up Hampstead village and indeed the whole county of Middlesex. But Hampstead Heath, remains an open space. It is an area very slightly smaller than Central Park, in New York. Dotted around the Heath are a number of ponds, fed by spring water and constructed in the 17th century by provide clean water for the City of London, 6 or 7 miles away. You may remember that the first of the Pickwick Papers, read by Mr Pickwick to the Pickwick Club in May 1827, when explorers in Africa were looking for the source of the Nile, was an account of how he had “traced to their source the mighty ponds of Hampstead”.

3. In the summer weather, like the heat wave we have been having during Wimbledon this last week, these ponds are very inviting to swimmers. There is also a hardy band who swim every day early in the morning, winter and

summer, even if they have to break the ice on the ponds to do so. As it happens, they include my colleague Lord Phillips who has just been appointed Lord Chief Justice of England.

4. Last fall the Corporation of London, who run the ponds, suddenly announced that they would have to keep them closed on winter mornings, when, in our northern latitude, it is still dark. They had been warned by the Health and Safety Executive a government agency, that they could not employ life guards in the dark. It was dangerous for the life guards. The swimmers said that they were perfectly prepared to swim without lifeguards. But the Corporation said there was still a risk that they might be sued or prosecuted for creating undue risks by allowing people to swim in the dark. That caused a lot of protest from the swimmers. But worse was to come. The ponds really hit the national headlines earlier this year, when the Corporation announced that budget cuts meant that they would have to reduce the number of life guards even in the daytime and therefore proposed to close two out of the three swimming ponds altogether. For a few days editorial and op-ed writers transferred their attention from Mr Blair's election campaign to the Hampstead Ponds. The unanimous view of the newspapers was that concerns for safety had gone too far. There were no life guards in Mr Keats's time. Why shouldn't people be entitled, at their own risk, to carry on doing what they had been doing for hundreds of years?

5. The swimmers brought judicial review proceedings against the City Corporation, asking for a declaration that they were acting irrationally in

closing the ponds because there was no possibility that they could be held liable, civilly or criminally, for allowing people to swim without supervision. On civil liability they were on firm ground, if one may use that expression in connection with swimming in ponds, because the House of Lords had said as much in a case about an actual swimming injury decided two years ago. The accident happened at a lake in Cheshire run by the local council, where people regularly went swimming or paddling off the beaches in warm weather. The council's safety officer told them they should stop people swimming because some day there was bound to be an accident. And the council did take rather ineffectual steps to keep swimmers out of the water. They put up notices and employed rangers to shout at the swimmers. But most of them took no notice. The safety officer said the only answer was dig up the beaches and strew them with nasty plants as if to repel an invasion. The council actually agreed to do this, but before room had been found in the budget, a young man plunged into the water one hot day, hit his head on the sandy bottom and broke his neck. He sued the council for negligence. His case was that their own records showed that they were aware of the possibility of an accident. They had been advised to take steps to prevent it and had not done so. And the Court of Appeal accepted this argument, although it deducted half the damages for contributory negligence by the young man in throwing himself into shallow water.

6. In the House of Lords we said that this was nonsense. There was no duty to stop people swimming. Indeed, it would be most unfair to the great majority who wanted to swim or play on the beach with their children. There was no

special dangers against which anyone needed to be warned. The lake was a perfectly ordinary stretch of open water. The fact that one could foresee that an accident might happen was no reason why one should have to take steps to prevent it. Life is full of risk and the only way to protect people against risk would be to stop them from doing anything whatever. Even that might not be enough.

7. So at the end of April this year, when the great Hampstead pond case came before a judge (who, as it happens, also lives in Hampstead) he had a solid precedent for denying that there could be civil liability simply from allowing people to swim. And he extended the same principle to criminal liability. The Health and Safety Executive can prosecute anyone running an undertaking like Hampstead Heath for not taking reasonable steps to ensure that other people are not exposed to risks to their health and safety. The judge said that allowing people to swim was not exposing them to risks. Any risk arose from their choosing to swim. So the swimmers won and the Lord Chief Justice will be able to take his early morning dip as usual this coming winter.

8. The pond case was widely applauded in the press and by leaders of the political parties during the general election campaign. Everyone seemed to be in favour of allowing people to take risks. So we might perhaps spend a moment considering why, in the earlier pond case in Cheshire, the Court of Appeal got it so badly wrong. The answer, I think, is this There is a tendency for judges to say that if you can foresee a risk that someone might suffer an injury and you can without unreasonable cost do something to prevent that

injury, then you owe a duty to take reasonable care to avoid the risk. This kind of calculation was most famously expressed by Learned Hand J in a formula which he devised in the *Carroll Towing Co* case in 1947: you take the foreseeable probability of an injury, multiply it by the gravity of that injury and ask whether the result is greater than the burden of taking precautions to avoid the risk. Hand of course knew perfectly well that the factors in his equation were incapable of quantification. The formula was one of those glittering epigrams with which he liked to tease more dull-witted lawyers. But the three factors which Hand mentioned: how likely is it that someone may be injured; how serious would the injury be and how difficult would it be to take steps to avoid the risk, are the factors which many judged in England and the US have used to decide whether a defendant should be held liable or not. Those were the factors which our Court of Appeal applied in the pond case. They said: is it foreseeable that there will be a injury? Yes it is: if you look at the Council's own records, you can see that the Safety Officer was regularly warning them that some swimmer might have an accident in the pond. How serious was such an injury likely to be? It might be very serious indeed: a swimmer might drown or a diver break his neck. How difficult would it be for the Council to take steps to avoid it? The budget for sending diggers and so forth to destroy the beaches was less than \$10,000. So the Court said that the Council should have acted.

9. There are many cases in which that kind of calculation works perfectly well. It was entirely suitable for the *Carroll Towing* case for which Hand

devised his formula. But, unless you stretch the meaning of the cost of taking precautions, it leaves out of account what I might call the social cost of the precautions necessary to avoid the risk; the effect they have on the lives of other citizens. In the pond case, that effect was particularly striking, because, as I have said, it made it necessary to prevent people from enjoying themselves in a way they had been doing perfectly legitimately for many years. And people suddenly began to notice other ways in which activities which they used to enjoy were disappearing because authorities responsible for those activities were afraid that it might be said they had not taken sufficient steps to avoid an accident. School outings under the supervision of teachers became rarities because educational authorities were concerned that they might be sued for taking insufficient care to prevent some child from having an accident. Country parks were becoming disfigured with notices warning people against obvious dangers. Old gravel paths were being replaced with ugly non-slip resin compounds. Even the worn flagstones in the 15th century church of the Cotswold village where we have a country cottage had to be replaced in case someone slipped and we were each asked to contribute the cost of a stone.

10. What are the reasons for these developments? In England, the cause has not been entirely the fear of civil litigation. There has also been the Health and Safety Executive, the government agency which I mentioned in connection with the Hampstead ponds. Their mission is to reduce the number of accidents. A fall in the numbers of people suffering accidental injuries is the measure of their success. And so, while no doubt they take into account the wider

consequences, they do not have to strike a balance between safety and liberty. That is a matter for the court. But naturally, few public authorities want to have the matter tested in court by a criminal prosecution. The City Corporation had no wish to go to court; for them it was enough that they had been advised that there was a risk of prosecution. It was the swimmers, very unusually, who took them to court. In England, therefore, the fear of prosecution for failing to take sufficient safety measures is often more immediate than the fear of civil liability. How one deals with such fears is a difficult matter. The agency is naturally reluctant to give any assurance that a particular course of conduct will not lead to a prosecution. But I think that concerns about restriction on liberty are creating a climate of opinion in Britain which may inhibit the Health and Safety Executive from being too heavy handed in carrying out their mission.

11. I therefore turn to the question of civil liability, which is of more interest to people at this conference. To put the matter into perspective, I should mention certain differences between personal injury litigation in England and the United States. First, we do not have juries in such cases. Secondly, we do not have punitive damages. Thirdly, damages for non-pecuniary loss, such as pain and suffering and loss of amenity, are regulated by a tariff which has been laid down by the Court of Appeal, under which the maximum award for the most severe injury is less than \$400,000. Of course the awards for actual losses, like loss of earnings or medical expenses, may be much higher, but such losses have to be proved. Fourthly, we do not have class actions. Fifthly, we do not have contingency fees, although in the last few years we have adopted a system

called conditional fees, under which the client pays nothing if he loses but up to 100% more than would otherwise be chargeable if he wins. Sixthly, a party who loses has to pay the other side's costs, which may be a disincentive unless you can insure against such liability or you have nothing to lose. Seventhly, although there are a number of lawyers in government, the Bar has virtually no political influence and its interests are no obstacle to any law reforms which might otherwise be thought necessary.

12. After listening to that list, you may wonder what we in England are worrying about. We already have a system of adjudication which includes a large number of the proposals for reform which are suggested in the papers to be presented at this conference. On the whole, concerns in England are not related to the questions of procedure. It is true that some people have suggested that the new conditional fee system is partly to blame. People who previously would not have been able to afford sue can now get lawyers to take on their cases on a no win no fee basis. For my part, I rather doubt whether this is the case. Before conditional fees were introduced they were able, if they really had few resources, to get state aid for litigation. Conditional fees provide access to the courts for rather more people than under the state aid system and at lower cost to the government. In any case, even if there has been some growth in litigation, it seems to me rather unfair to reduce it by making the courts available only to the rich.

13. The problem in England is rather, I think, uncertainty about the reach of the substantive rules which determine liability. There has been a progressive

extension, with which lawyers in the United States will be familiar, in the liability of public authorities. Over the past ten years it has been established, for example, that people can in principle sue the state school they attended for failing to notice that they suffered from dyslexia and not giving them appropriate teaching. Not many cases succeed and when they do, the difficulty of proving that one's failure in life thereafter was caused by inadequate teaching are such that awards have been extremely modest: in the region of less than \$50,000. But the burden on schools of contesting such cases may be very considerable.

14. The pond case was the first clear statement in England that countervailing social costs have to be taken into account when considering any extension of tort liability. This was a very desirable step for the courts to take. But it does not by any means solve all the problems. The pond case was an example where the social cost was stark and clear. The ponds were about to be shut down and a lot of influential people got very upset about it. But there are many cases in which the social cost is not so obvious. For example, we have had a rule, laid down many years ago, that you cannot sue the police for damage attributable to their negligence in the conduct of a criminal investigation. If you claim that you warned the police that someone was threatening your person or property and they do nothing about it, you still cannot sue them when you are assaulted or your house is broken into. The policy is that on balance it is a waste of resources to have a judicial investigation into whether a police investigation was properly conducted. It

wastes legal costs and police time. It is more productive to spend the money on better policing. The social cost of providing a remedy is too high. But shut-out rules like that are extremely unpopular. A similar argument was tried in the school dyslexia cases, that it was a waste of resources to investigate exactly how someone was taught in his time at high school. It failed. Furthermore, the European Court of Human Rights was very disapproving of the police rule, although they have now been persuaded that there is no human right to sue in tort and the question of whether British citizens can sue their police is none of their business. Nevertheless, judges seem to feel that these policy-driven restrictions on tort liability are an unfair denial of justice to the individual on grounds of general utility; sacrificing the individual to the greatest good of the greatest number.

15. For my part, I do not think that the right to sue in tort is an individual right which cannot be trumped on utilitarian grounds. As part of the system of compensation for injuries, tort law is often arbitrary and unfair as between people who have suffered identical injuries, where one gets generous compensation and the other gets nothing. A reform of the system on utilitarian grounds seems to me exactly what is required. And such a reformed system must not only be fair, within the limits of available resources, to those who have suffered injury, but not distort the priorities of society by diverting resources from activities where they are most needed and by restricting the liberty of individuals to enjoy their lives in their own way.