



**National
Trust**

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████████████████ - OFFICIAL - Regulation 28 to Prevent Future
Deaths - The Late Mhlanga-Veira

Date: 21 January 2022

Mrs Heidi J Connor

Senior Coroner for Berkshire

Sent via Email only

Response to Regulation 28 PFD Report from the National Trust

1. The National Trust ("The Trust") is a registered charity incorporated by statute. It is a membership organisation and works to preserve places of historical interest and natural beauty in England, Wales, and Northern Ireland. The Trust facilitates access to such places for the benefit of the nation.
2. We would once again like to express our sincere condolences to Jordan`s family and friends.
3. The Trust was not an Interested Person to the inquest touching on Jordan`s death and did not receive disclosure in advance of the inquest. However, to assist HMSC, the Trust provided statements from ██████████, Operational Senior Risk Business Partner and ██████████, General Manager for the Cliveden portfolio, which includes the area of the Thames at Cock Marsh where the accident occurred. These statements set out details of the Trust`s approach to water safety on the land it owns along the coastline and near inland waterways and details of the specific risk assessment and control measures in place at Cock Marsh. Both statements were admitted in evidence under rule 23.
4. HMSC requested the attendance of a witness from the Trust to assist in her consideration of Regulation 28 issues, specifically with regards to signage and water safety issues at Cock Marsh.
5. This response to the Regulation 28 report should be read with the statements of ██████████ and ██████████.
6. As a responsible landowner with many miles of coastline and waterways, the Trust takes its responsibilities very seriously including the safety and wellbeing of visitors. The Trust is a longstanding member of the Visitor Safety Group (VSG) a partnership organisation concerned with visitor safety. Other members of the group include British Waterways and the Environment Agency. The Trust adopts the VGS`s guiding principles that emphasise the importance of conservation, access and personal enjoyment of the countryside and need to find balance between safety and its wider objectives. The principles also underpin the balance between the personal responsibility of visitors and responsibility of the landowner.

7. In this response, The Trust addresses the 2 areas of concern set out in paragraph 5 of the Regulation 28 report. The responses follow discussions with the Environment Agency.
8. The Trust also outlines below the main legal duties and case law relating to water safety risks and the issues relating to the land at Cock Marsh.
9. HMSC heard evidence from [REDACTED] as part of her consideration for making a Regulation 28 report. [REDACTED] gave evidence (also contained in his statement) that the Trust owns parts of the land known as Maidenhead and Cookham Common. Cock Marsh forms part of that area. The land at Cock Marsh is registered as Common under the Common Land Registry. The Trust has a specific statutory duty to keep common land unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public. It is not within the power of the Trust as landowner to fence or obstruct the public or commoner's access to the area. The Trust as landowner must take account of commoner's rights while managing common land. It is not possible, practicable or desirable to restrict public access to the river in this area of land.
10. A landowner of one side of the bank of the river, may have riparian ownership of the riverbed to the middle of the watercourse where generally the ownership would transfer to the opposing bank landowner a full review of title deeds of any landowners would be needed in order to ascertain the riverbed ownership at any particular point. The Trust understands the Environment Agency is the authority with specific powers and duties in relation to the River Thames and navigation at this location.
11. The Regulation 28 report refers to evidence heard at the inquest about the differences between tidal and non-tidal waters in terms of safety. HMSC heard evidence from [REDACTED] from the Kingston Marine Volunteer Service and [REDACTED] from the Environment Agency that suggested there were differences between coastal waters and inland waterways in terms of safety arrangements.

The Legal Framework and Relevant Guidance

12. The relevant statutory and common law provisions apply equally to coastal and inland waterways. The applicable law for landowners can be found within the Occupiers' Liability Acts and for employers, the Health and Safety at Work etc. Act 1974. Neither of the statutes impose a duty on the landowner to guard against an obvious hazard such as a water course or provide risk mitigation measures for those who choose to undertake activity not being promoted or organised by the landowner or employer's undertaking. The application of these statutory provisions and of the common law has been clearly and authoritatively stated by the High Court, Court of Appeal and the House of Lords.
13. In *Darby v National Trust* [2001] PIQR P372 the claimant's husband was tragically drowned while swimming in a pond on the National Trust estate at Hardwick Hall. The pond was owned by the National Trust. At trial there was uncontradicted evidence which the judge accepted that the pond was unsuitable for swimming because it was deep in the middle and the edges were uneven. It was submitted that the National Trust should have made it clear that swimming in the pond was not allowed and taken steps to enforce the prohibition. Allowing the appeal of the National Trust May LJ giving the judgment of the court of appeal rejected that submission (emphasis added):

"27. [Counsel for the claimant] **submitted that there was no proper correlation between the risk of swimming in this pond and the risk of swimming in the sea or other open water. I do not agree.** It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs. **In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased.** That, in my view, applies as much to the risk that a swimmer

might get into difficulties from the temperature of the water as to the risk that he might get into difficulties from mud or sludge on the bottom of the pond.”

Darby was cited with approval by the House of Lords in *Tomlinson v Congleton Borough Council* [2004] AC 46. There was debate about whether the claimant in that case was a trespasser, but the case did not turn on that factor. The claimant ignored warning signs and dived into a lake that had formed in a disused quarry owned and managed by the defendants. He suffered grave injury. His claim for breach of statutory duty and at common law failed. The reasons included that the risk was attributable to the conduct of the claimant, not the state of the premises (paragraphs 27 and 34) and the following (emphasis added):

“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] QB 1008, 1024, para 53 and which I said was central to this appeal. **Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk...**

45. **I think it will 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 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.**

Further, Lord Hutton stated:

“59. ... it is contrary to common sense, and therefore to sound law, to expect an occupier to provide protection against an obvious danger on his land arising from natural features such as a lake or a cliff and to impose a duty on him to do so ...”

14. The same considerations apply to the duty under the Health and Safety at Work Act 1974 and associated Regulations such as the Management of Health and Safety at Work Regulations 1999, see *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] 1 WLR 2930.
15. Relevant guidance to landowners such as the National Trust is to be found in *Managing Visitor Safety in the Countryside*, now in its third edition. This is produced by the Visitor Safety Group, comprised of a number of organisations that own and manage land and property with day-to-day experience of visitor management as well as the national policy makers and specialist safety advisors. The guidance is endorsed by the Health and Safety Executive in the following terms:

“The HSE supports the VSG’s commitment to promoting a sensible and proportionate approach to managing safety in the countryside. The guidance provides a valuable framework for managing risk to visitors which is sensitive to the intrinsic value of the landscape and does not unduly restrict public access”
16. The Trust applies the VSG guiding principles through its process of site-specific risk assessments. In particular, the Trust aims to take account of conservation, heritage, recreational and cultural landscape objectives and aims to avoid taking away people’s sense of freedom and adventure. This approach also balances the individual’s free choice with the suitability and practicability of any risk reduction measures while not curtailing the freedoms of all.

Prevention of Future Death Report

17. The Senior Coroner has set out two matters of concern.
18. The first of these concerns relate to safety measures specifically in relation to Cock Marsh. The second area of concern relates to inland waters more generally with consideration to approaching safety in relation to non-tidal waters in the same way that tidal waters are dealt with.
19. At Cock Marsh, the Trust produced a detailed risk assessment for a large area of open common land with multiple points of entry. This included the access to the River Thames. The Trust neither owns nor has control of the River Thames. The Trust does not prohibit or promote or encourage swimming.
20. The Thames itself is an obvious water course with a marina opposite and boats and watercraft of various sizes operating throughout the day. The water must be of sufficient depth for boats to use the river. In addition to the risk of drowning there is the additional hazard of moving craft. Both risks are plain and obvious.
21. As a landowner with extensive ownership of inland waterways and coastal areas and with many millions of visitors a year, it is not reasonable or practicable to patrol all areas where visitors may choose to take risks at any time of the day. There is no requirement for landowners to safeguard all possible risks that visitors choose to undertake including entry into the water.
22. Following discussions with the Environment Agency, the Trust acknowledges that stretches of the Thames can become deep suddenly, and that water visibility is generally insufficient to the depth of hazard beneath the surface, and it can be difficult to establish the speed of the flow. All these factors can be influenced by meteorological events including the amount of rain further upstream which make hazards variable in nature. This further detailed information will be considered in the risk assessment.
23. The Trust is very grateful to the Senior Coroner both for her suggestions and her recognition that there are competing considerations which do not lend themselves to clear or easy answers.
24. Buoys. The Trust does not own, operate or control the River. It is not within its power to unilaterally place buoys in the water. However, even if it was, the Trust would have a very serious concern that the presence of buoys would indicate by implication that areas of the River were safe to swim in and thereby encourage people into the water. That would be contrary to the Trust's overall approach to water safety and the relevant guidance. Further, buoys would, as the Trust understands it, interfere with the legitimate rights of users of the river. The Trust understands this is also the position of the Environment Agency.
25. The position of throw ropes. The Trust does not generally provide throw ropes. It does not believe the specific rope referred to was located on National Trust land. Experience tells us that equipment such as throw ropes is often stolen and/or vandalised. The Trust's experience is that the provision of public rescue equipment creates an inducement for either misuse or a perception of safety.
26. Signage. The Trust and the Environment Agency have concerns around the effectiveness of signage measures and its environmental impact. That is especially so where, as here, there are multiple routes to the water.
27. Nevertheless, the public access risk assessment covering Maidenhead and Cookham Common including Cock Marsh was reviewed by the Operational Risk Business Partner [REDACTED] as soon as the Trust was made aware of the incident. Following the conclusion of the inquest, an urgent review was undertaken whether the site posed any specific extra risk at that time. The Trust's Legal and Operational risk team discussed and considered the matter and concluded that factors such as the time of year and weather meant that the site was unlikely to be at any increased risk at that time.

28. Following your report, it was agreed as a priority the General Manager [REDACTED], Lead Ranger, [REDACTED] and Head of Compliance [REDACTED] would visit the site and review the current risk assessment and consider whether further reasonably practicable and effective measures could be put in place to reduce the risk associated voluntarily accepted by those who chose to swim in that area of the Thames.
29. The risk assessment was reviewed fully during the site visit in January 2022. It is anticipated the following steps will be implemented:
- i) Following the site visit and review of the current visitor risk assessment, which covers a large area of land and a number of other visitor risks, the area known as the beach and other potential similar locations at Cock Marsh will be separately drawn out into a distinct visitor risk assessment specially to consider drowning risk.
 - ii) This new risk assessment document will provide a fuller description of the area and further details of control measures already in place together with reasoned consideration for the approach to any hazards that are not obvious.
 - iii) A signage pilot will commence prior to the early spring Bank Holiday to test the location, wording and effectiveness of such measures at the specific location warning of depth, strong currents, and hidden obstacles. The risk assessment will also consider the location of existing lifesaving equipment and whether further provision should be made.
30. There are plans for the Property Team to share this information Jordan`s family. The Trust would also propose reviewing website visitor information and content for this property to consider reflecting any additional information informed by the risk assessment / signage pilot.
31. The Trust has carefully considered the second matter of concern within the Regulation 28 report. For the reasons set out above the Trust does not believe there is any legal distinction between non-tidal and tidal waters or coastal or inland waterways. As such, the same legal duties apply to both coastal waters and inland waterways and tidal and non-tidal waters. The Trust does not make any specific distinction between coastal waters and inland waterways as far as water safety is concerned and undertakes risk assessments with annual reviews that consider visitor safety on the land it owns along the coastline and next to inland waterways. In both cases it applies the VSG Guidance.
32. It remains the view of the Trust that the best control mechanism for the risks associated with Coastal and Inland Waterways and tidal and non-tidal water courses is better education. The Trust recently contributed the National Water Safety Forum consultation on improving water safety and noted with interest at the recent conference the planned adoption of new water safety messaging and campaigns for 2022.

[REDACTED]
Assistant Director.

Cc. Director General's Office for National Trust.