‘The impacts of the current Occupiers’ Liability legislation in Northern Ireland on outdoor recreation’

Background to the Study

‘Outplan’ and ‘Public Right of Way Services Ltd’ were appointed by Sport NI in early 2011 to undertake a review into ‘**the impacts of the current Occupiers’ Liability legislation in Northern Ireland on outdoor recreation’**, specifically outdoor recreation that is informal and not facility based. A more comprehensive definition of outdoor recreation in this context will follow later.

This review follows on from work previously undertaken in 2001 by PROW Services Ltd for the Northern Ireland Countryside Access and Activities Network (CAAN) which looked extensively at the actual current legislation and its impacts on “Recreational Use of the Countryside”, not least given the changes that had been made to equivalent legislation in the Republic of Ireland in 1995 to cater for such matters.

Subsequently, in 2008, the Department of the Environment and the Department of Finance and Personnel jointly published “Occupiers’ Liability Law in the Context of Access to the Countryside in Northern Ireland – An Information Leaflet” and announced that no changes were proposed to the existing legislation not least given decisions on cases from 2003 onwards by the Law Lords and Court of Appeal. A detailed analysis, for those who wish it, of relevant cases is included in this report at Appendix 1. Such cases relate to premises and structures and if anything, highlight the lack of liability attaching to informal recreation.

However, a clear perception still exists in the minds of landowners and indeed public land managers that to allow recreational users onto their land carries with it a degree of risk in terms of potential liability claims despite these consistent rulings from the courts.

Through the implementation of “Sport Matters” – The Northern Ireland Strategy for Sport and Physical Recreation 2009-2019, the existing 1998 Countryside Recreation Strategy for Northern Ireland is now being fully updated and re-written with the active involvement of all the relevant Departments. It was felt fundamental in going forward with a new wider-based ‘Outdoor Recreation Strategy’ that these perception issues were further addressed in an open and positive way with those representing both private and public landowners.

It is also fundamental that the responsibilities attached to those who use such land for recreation, largely common sense matters highlighted by the Law Lords, are widely known and understood by users.

Thus this Study has three 3 fundamental aims.

Firstly, through interviews, questionnaires and background research with all land-owning public bodies and with representatives of private land-owners, to compile a definitive list as possible of any successful and unsuccessful cases against a landowner, occupier or manager with respect to recreational users of land over the last 20 years. This also covers any 'out of court settlements' and this element has involved considerable interaction with Insurance providers and underwriters. This material is compiled in Part 1:'The Reality of Claims' (Pg.5).

Secondly, as will be noted from reading Part 1, given that the perception does not reflect the reality of claims or even a so-called 'claim culture', the Study in Part 2, titled 'Perception is Nine Tenths of Reality – Changing Realities' (Pg.26) then seeks to address the reasons for those perceptions and how such matters can be better informed. As an add-on to the original Study, it was decided to further test the perceptions of a range of users through direct interviews. The results from this process will be referred to in the text but a full report of the interview process and outcomes in included at Appendix 2.

Thirdly, the Study sets out recommendations for both dealing with these misconceptions through better informing landowners and recreational users of their respective rights and responsibilities.

The underlying intention is that this Study should form the basis of positive progress on furthering outdoor recreation, the health and economic benefits of which have been underwritten by the Assembly.

For reasons which will become apparent from the findings of the Study, the Authors feel that it is necessary right at the outset to highlight both the main legal context and the definition of what we mean by both 'outdoor recreation' and the 'natural environment'.

The Main Legal Context

Tomlinson v Congleton Borough Council [2003]

The primary case relevant to this issue is Tomlinson v Congleton Borough Council [2003] in which the court of appeal found in favour of Congleton Borough Council with respect to a young man who had dived into open water and broken his neck.

The Tomlinson case provides a pertinent example of the common sense approach courts have consistently adopted in relation to trespassers.

In that case Lord Hutton commented: "*it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or cliff and impose upon him a duty to do so.*"

What that case (and subsequent cases – see Appendix 1) clearly demonstrate is that it is very difficult for trespassers or indeed 'visitors' (a person expressly invited or induced onto the land) to successfully claim compensation for accidents which occur in the natural environment.

This case and those subsequent indicate that landowners have essentially nothing to fear from accidents which occur as a result of the natural state of their land. As this Study will reinforce, there is no known case of adult trespassers or users successfully suing a landowner because of an injury caused due to natural features arising in the countryside.

In the Tomlinson case, Lord Hoffmann also commented that if even he (Tomlinson) had been a 'visitor': *"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."*

This limitation on any duty of care towards even visitors extends long before the Tomlinson case. In an Appeal Court case (Hillen and Pettigrew v ICI (Alkali) Ltd) in 1936, Lord Atkin stated:

"My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purpose for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Lord Justice Scrutton pointedly said (Calgarth Case, 1926]: 'when you invite a person into your house to use the staircase you do not invite him to slide down the banisters'.

What do we mean by 'Outdoor Recreation'?

For the purposes of this study "Outdoor Recreation" has been defined as non-motorized sporting and recreational activities that take place in the natural environment and that generally do not require a dedicated pitch or built facility.

What do we mean by 'Informal recreational use of land' in terms of outdoor recreation?

- The land is being used on a casual basis for recreational activity.
- The land is in a natural or semi-natural state. This includes old tracks or paths.

What constitutes 'natural'?

In the House of Lords decision on the Tomlinson case (2003), Lord Hutton, referred back to a number of previous cases including Scottish authorities from the early years of the 20th Century which, he said: " *express a principle which is still valid today, namely, that it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger arising on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so".*

In a notable Scottish case, McCluskey v The Lord Advocate, (1994), a claim for damages was brought by a woman who was injured during a family visit to Rogie Falls, a Forestry Commission Scotland site, when she slipped on a narrow track and fell onto rocks. The action was unsuccessful because the court concluded that no liability under the Scottish Occupier's Liability (1960) Act arose, because the state of the track was obvious and it represented a danger (in this case a natural physical feature) against which she should have protected herself. The court held that the person voluntarily chose an obviously dangerous route and voluntarily accepted the risk.

This case shows that what can be considered 'natural' also extends to tracks and by inference that a range of features in the landscape (such as stone walls) would also be likely to be deemed 'natural' by the courts.

Part 1: The 'Reality' of Claims

The Study required an extensive programme of desk-top research and in-depth interviews with a wide range of landowning bodies and\ or their representatives.

The intended purpose was to compile a definitive list of any successful and unsuccessful cases against a landowner, occupier or manager with respect to recreational users of land over the last 20 years. This was also to cover any 'out of court settlements'. This degree of retrospection proved difficult in terms of records and personnel but considerable and consistent data was collated and is covered in the ensuing text. However, it should be noted that not one single case emerged of a successful claim for the informal recreational use of the natural environment.

A number of general themes emerged almost universally in the research and it is important that these are highlighted at the outset as they give an insight into the perception issues we will subsequently try to unravel and deal with.

a) **Difficulty on behalf of respondents in understanding what was meant by 'informal' outdoor recreation.**

   There was a general desire on behalf of those interviewed or questioned to think purely in terms of 'facility-based' recreation. This manifested itself in the examples they gave of 'claims' which were almost invariably to do with built structures or areas where the duty of care (to users) would normally be greater (such as at a purpose built facility).

b) **A tendency to confuse the concept of Occupiers' Liability with the requirements of Health and Safety legislation.**

   This manifested itself in what were quoted as 'necessary' management practices which again invariably related to buildings or areas where the risks had been identified and had to be managed. Urban Parks and Green spaces were often quoted as areas which were a source of claims unless 'reasonable' steps had been taken to manage risk. Both occupiers' liability law and the health and safety law require an occupier to do that which is reasonable in relation to the provision of safety. However, in the 'natural' environment, the Courts have consistently held that the requirement is for the individual to manage what they themselves do rather than for a landowner to manage

any risk. This distinction was largely not fully understood by the landowners and land managers interviewed.

c) A lack of understanding as to the actual legal position.

Partly reflecting a) and b) above, cases were quoted which were not relevant to Occupiers' Liability and the recreational use of land. When the issues were explored, a realisation often set in with those interviewed that what this Study was concerned with, the informal recreational use of the natural environment, "wasn't a problem".

The Study will now look at the response from the various landowning sectors in detail.

Because of the differing 'status' of landowners, they have been considered as follows.

Public Land managed by Central Government Departments or their Agencies:

Public Land in Northern Ireland

A recent report (2010) on 'Accessibility of publicly owned land across Northern Ireland for outdoor recreation' produced by the Countryside Access and Activities Network (CAAN) highlighted that Forest Service is the land owner that holds the largest percentage of public land used for outdoor recreation, controlling 90% of such land. Second to this figure was NIEA, holding 4% of all publicly owned land in Northern Ireland used for outdoor recreation. After this were the District Councils, also owning 4% in total, but marginally less in hectares than NIEA. Next was NI Water, with 1%, then DARD, DCAL, Waterways Ireland, and the Loughs Agency collectively all owning less than 1%.

As Central Government carries its own risk (i.e. it does not take out commercial insurance), this Study examines the issues affecting that sector first. It should be noted that NI Water is no longer part of the Central Government grouping as it now utilises its own in-house legal services and Commercial insurance and will be covered in the grouping along with District Councils, who also utilise commercial insurance, later in the Study report.

We had hoped to obtain an overview on cases in relation to all Central Government Departments and to have an interview with a representative(s) from the Departmental Solicitor's Office (DSO), now a centralised service within the Department of Finance and Personnel. However, despite various attempts to do so, we were informed that they did not themselves hold the information in the form requested and indeed only held it on behalf of Departments. Thus it could not be released by them as it was the Departments who control the information and who were entitled, where appropriate, to claim legal professional privilege in respect of it. However, all relevant Departments and Agencies were contacted and\ or interviewed separately as part of the Study.

Forest Service:

As the largest public land manager (90%), Forest Service has potentially a vital recreational role particularly in the context of Northern Ireland where little or no Rights of Way infrastructure exists and access to the countryside is generally limited through the lack of comparative legislation to that which exists in England and Wales (The Countryside and Rights of Way Act 2000) and Scotland (The Land Reform (Scotland) Act 2003).

Their equivalent body in Great Britain is the Forestry Commission who are the largest land manager in Britain and the biggest provider of outdoor recreation. As Forestry is a devolved matter, Forestry Commission England, Forestry Commission Scotland and Forestry Commission Wales report directly to their appropriate Minister, providing advice on policy and implementing that policy within the relevant country.

Collectively, the Commissions have stated that they are keen to provide and enhance public access to forests and woodlands given the associated impact on recreation and tourism. These are seen as being important aspects of sustainable forestry due to increasing demands from people to take part in these activities and reflect the developing recognition of the wide ranging benefits that forests can provide to society, for example, in relation to economic development, public health and well-being, as well as education and learning.

In Northern Ireland, the potential role of our Forest Service was recently enhanced through the requirements and provisions of the Forestry Act (Northern Ireland) 2010.

Forest Service has now (March 2011) produced 'draft' bye-laws as allowed for in the Act. However, it is the Authors view that these draft bye-laws are unduly influenced by Health

and Safety considerations and do not reflect the degree of actual risk implied or indeed interpreted under Occupiers' Liability legislation, a common confusion highlighted at the outset of this Study.

The Forestry Act (Northern Ireland) 2010

Relevant Extracts:

Under Section 1 of that Act: "General duty of the Department:

1—(1) The Department of Agriculture and Rural Development ("the Department") has the general duty of promoting afforestation and sustainable forestry.

(2) The Department **must** carry out that duty—

(a) in relation to forestry land, in such a way as to promote and encourage the enjoyment and recreational use of that land by the public; and

(b) in relation to other forests, in such a way as to promote the social benefits of those forests."

The Act has also provided (under Section 31) a 'right of access' as detailed below:

"Public right of access to, and byelaws for, forestry land

31—(1) Subject as follows, the public shall have right of access on foot to all forestry land for the purposes of recreation.

(2) That right of access does not extend—

(a) to any building or structure on forestry land; or

(b) to any facility on forestry land in respect of which a charge is payable under section 3.

(3) That right of access is subject—

(a) to byelaws under subsection (4); and

(b) in the case of land held by the Department under a lease, to the terms of the lease.

(4) The Department may make byelaws—

(a) making such provision as may appear to the Department to be necessary for the preservation of trees or timber on forestry land;

(b) prohibiting or regulating any act or thing likely to injure or disfigure forestry land or the amenities of, or facilities provided on, that land;

(c) providing for the reasonable use of forestry land by the public for the purposes of recreation;

(d) excluding or restricting the right of access conferred by subsection (1) in circumstances or for purposes specified in the byelaws and subject to such conditions (if any) as may be so specified."

This overriding concern over Health and Safety issues was also reflected in the interview with Forest Service's Director of Forestry. It was agreed that any claims (usually less than 10 a year) were normally associated with structures.

He expressed concern (citing Tomlinson) that there was still a lack of clarity around what constitutes a 'natural feature', exampling piles of logs, forest roads and drainage ditches all of which he himself regarded as risks.

The Director of Forestry stated that the Departmental Solicitors Office (DSO) seemed to be of the opinion that stone steps, wooden walkways, and fences were all 'un-natural' and that claims relating to these were normally settled and he cited a number of claims to example this. One was in relation to a teenage girl slipping on a wooden walkway, which despite having been constructed to the proper and appropriate specifications, was settled as the wood was considered 'slippery'. Another related to a branch from a healthy tree having fallen on a vehicle, a claim over which is still pending. He also cited a case where a young boy on a bicycle had ridden into the base of an old bench seat and fell off his bicycle. The base was obviously at ground level and was hardly visible. He felt that further legal clarification on the meaning of 'natural' would be welcomed.

In terms of Forest Parks, he felt that the demands (in terms of risk assessments) were greater as visitors were invited and pay an admission charge if entering by vehicle. He felt that there was more of a 'claim culture' in relation to public bodies. In terms of the new legislation (2010 Act), he felt that access to the "wild parts" of Forests would be unlikely to result in any increase in claims.

Overall he felt that the demands of doing risk assessments and of dealing with even spurious claims were costly in terms of time and resources.

FOREST SERVICE

Northern Ireland Environmental Agency (NIEA)

Discussions took place with NIEA staff and subsequently information on claims with respect to land under their control (summarised below) was received.

The discussions largely focused on the issue of insurance of walks which were promoted under the current 'quality walks' branding. NIEA currently pay for the public liability insurance for the Waymarked Ways and the Ulster Way with CAAN being the policy holder. However, NIEA are reluctant to provide insurance cover for all the quality walks although the premium quoted was relatively modest. Their concerns relate to whether every route not a Right of Way would eventually have to be covered by insurance at the insistence of landowners and whether in many cases District Councils should be paying for such insurance.

The issue of a 'fighting fund' was also discussed as something that might be raised with UFU (and NIAPA) but no consideration was given as to where such a fund would originate from.

History of Claims (for full details see Page 11)

From 2008 to 2010, there were 50 alleged injuries recorded at NIEA's 'Tourist Sites' (Country Parks and Historic Buildings and Monuments owned by them). These are tabled below. Many of these seem to be around informal enjoyment of the properties. Six of these incidents related to what should be risk assessed structures or housed animals resulted in claims. Four were immediately refuted and went no further. One case, still on-going, involves a supposedly 'tame' animal housed in a Country Park. The only other case involved an incident where a child hit the (presumably inconspicuous) remains of a plinth at a Historic Monument. This claim was settled for an undisclosed amount.

Risk-Benefit Analysis

Risk-benefit analysis is the comparison of the risk of a situation to its related benefits. Exposure to personal risk is recognized as a normal aspect of everyday life. We accept a certain level of risk in our lives as necessary to achieve certain benefits. In most of these risks we feel as though we have some sort of control over the situation. For example, driving a car is a risk most people take daily. The controlling factor appears to be the perception of the individual's ability to manage the risk-creating situation. When individuals are exposed to involuntary risk, risk which they have no control, they make risk aversion their primary goal.

Source: Washington University, St Louis

Cases where claim submitted

Year/Date	Location	Nature of Alleged Injury	Circumstances of Incident	Legal Action?	Initial Claim (£)	Amount Paid (£)	Amount out-standing (£)	Open/ closed?	Claim refuted?
05/04/2008	Carrickfergus Castle	Unspecified	Flagstone trip outside Castle precincts	Yes	Unspecified	0	0	Presumed closed	Yes - Referred to Council
05/05/2008	Crawfordsburn Country Park	Unspecified	Pothole trip	Yes	Unspecified	0	0	Presumed closed	Yes
11/05/2008	Scrabo Country Park	Minor cuts to hand	Unsupervised child put hand through boundary hedge and cut it on farm fence behind	Direct claim	Unspecified	0	0	Presumed closed	Yes
22/09/2008	A Country Park	Damaged knee ligaments	Butted by ram (tame and in a paddock)	Yes	£10,000	0	Yet to be considered	Open	Awaiting details from claimant
16/06/2009	An Historic Monument	Cut to back of head leaving some scarring, largely covered by hair	Child cycling across grass hit concrete plinth and struck head on bolt for securing picnic table which had been removed after being vandalised	Yes	Unspecified	0	Sum agreed but undisclosed as yet pending court approval	Open	No
27/07/2009	Roe Valley Country Park	Unspecified	Unspecified trip	Yes	Unspecified	0	0	Presumed closed	Yes

Cases where no claim submitted

Year/Date	Location	Nature of Alleged Injury	Circumstances of Incident	Legal Action?
2007				
29/12/2007	Carrickfergus Castle	Head injury	Stumbled, fell and hit head	No
2008				
27/03/2008	Hillsborough	Unspecified	Fall	No
08/04/2008	Carrickfergus	Unspecified	Trip on step	No
05/04/2008	Ness Wood	Damage to knee	Slip	No
05/05/2008	Crawfordsburn Country Park	Broken ankle	Footballing injury	No
28/05/2008	Scrabo Country Park	Unspecified	Hit by stone thrown up by a ride-on mower	No
14/06/2008	Scrabo Country Park	Unspecified	Fall down zig-zag path	No
10/06/2008	Roe Valley Country Park	Unspecified	Loss of balance when foot went into a hole	No
30/06/2008	Scrabo Country Park	Bruising to leg	Trip on step	No
26/07/2008	Carrickfergus Castle	Cut head	Fall (child)	No
30/07/2008	Devenish Monastic Site	Unspecified	Fall from ladder in Round Tower	No
23/07/2008	Roe Valley Country Park	Hurt ankle	Slip on slippery rocks	No
24/09/2008	Roe Valley Country Park	Split head	Trip on kerb	No
24/09/2008	Roe Valley Country park	Unspecified	Fall down hole at badger set	No
28/10/2008	Peatlands Park	Hurt right knee	Slip whilst coming down mound	No
26/07/2008	Green Castle	Twisted right ankle	Descending steps	No
28/10/2008	Woodland School	Unspecified	Slip down mound	No
28/10/2008	Castlearchdale Country Park	Sprained ankle	Walking along pathway	No
2009				
26/01/2009	Peatlands Park	Badly bruised wrist	Trip over wire	No
02/04/2009	Roe Valley Country Park	Unspecified	Child fainted at sight of blood	No
07/07/2009	Dunluce Castle	Unspecified	Trip over small walled area	No
13/07/2009	Peatlands country Park	Cut open finger	Injury from Barbecue	No
27/07/2009	ROE Valley	Hurt ankle	Fall	No
02/08/2009	Navan Fort	Hurt ankle	Stepping in a hole	No
11/08/2009	Crawfordsburn Country Park	Hurt ankle	Fall	No
12/01/2009	Carrickfergus Castle	Unspecified	Head banged on wall	No
02/05/2008	Carrickfergus Castle	Unspecified	Fall off bench	No
2010				
24/03/2010	Crawfordsburn Country Park	Unspecified	Dog Attack	No
01/07/2010	Crawfordsburn Country Park	Unspecified	Dog attack	No
02/07/2010	Carrickfergus Castle	Hurt nose	Fall	No
26/06/2010	Carrickfergus Castle	Unspecified	Trip on step	No
08/05/2010	Carrickfergus Castle	Unspecified	Running into metal rail	No
27/07/2010	Green Castle	Unspecified	Head hit on rock (child)	No
28/07/2010	Carrickfergus Castle	Unspecified	Fall off step	No
28/07/2010	Carrickfergus Castle	Unspecified	Fall off cannon	No
28/07/2010	Crawfordsburn Country Park	Cut foot	Walking on beach	No
28/07/2010	Crawfordsburn Country Park	Unspecified	Fall off scooter	No
10/08/2010	Crawfordsburn Country Park	Cut foot	Walking on beach	No
10/08/2010	Carrickfergus Castle	Unspecified	Fall from wall striking head	No
31/08/2010	Crawfordsburn Country Park	Unspecified	Knocked over by two dogs	No
30/08/2010	Roe Valley Country Park	Unspecified	Fall on steps leading to Carrick Church	No
09/09/2010	Dunluce Castle	Unspecified	Fall on cobbled stones	No
03/09/2010	Carrickfergus Castle	Unspecified	Fall (child)	No
05/09/2010	Castle Archdale	Broken ankle	Trip	No
09/09/2010	Dunluce Castle	Unspecified	Trip and fall	No

There is no record of any claim relating to our definition of informal outdoor recreation.

Inland Waterways (DCAL)

DCAL owns, manages and develops the Lagan Navigation, the Coalisland Canal and 21 recreation sites across the Province. DCAL actively encourages and promotes participation at its water recreation sites at which it provides facilities such as slips, jetties, car parks, picnic areas, seating etc. It also provides access along certain of the towpaths.

They receive an average of 2 cases per year re: Occupier's Liability overall. However, these cases relate to structures or facilities provided. They have a maintenance regime (contracted to DARD staff) for these facilities and take advice from the DSO as to when they fight or settle any cases. However, overall claims are not regarded as a problem.

Examples of claims over the years would mostly be around accidents on the Lagan Towpath involving trips, bicycles and a swimming accident on Lough Neagh. These were mostly successfully defended. There is current towpath case around an overhanging branch and a cyclist which they are contesting. The swimming case was somebody injured on a buoy but DCAL not considered responsible and the case was dropped.

However, it is fair to say that DCAL's sites are largely 'formal' recreation sites with an anticipation of a higher degree of management.

District Councils and Water NI.

District Councils

The 26 District Councils in Northern Ireland are significant recreation providers. The CAAN report referred to on page 4 records that, collectively, the Councils hold the same proportion of the publicly owned land in NI used for outdoor recreation as NIEA (4%). But while the NIEA land is managed and used mainly for informal activities such as walking and cycling, the majority of the district councils' land would appear to be laid out either as sports pitches and recreation grounds, intended to be used for organised sporting activities, or as more formal urban parks and open spaces. As such the land is usually managed collectively as part the council's 'recreational estate' together with built facilities such as children's playgrounds, recreation or leisure centres and swimming pools.

To develop as full an understanding as possible both of the number of liability claims being made against District Councils as landowners in respect of informal outdoor recreation (and also the Councils' underlying approach towards the provision of such recreation opportunities), a separate survey was conducted. This aimed to identify the officer in each District Council directly responsible for dealing with any liability claims and to gather information from them by means of a semi-structured telephone interview. 20 of the 26 Councils responded to our requests to provide information. However, many of the officers interviewed had been in post only for a relatively short period of time and were unable to provide historical information over the long term. In common with other recreation providers (and as noted earlier) the officers that were interviewed generally did not draw a clear distinction between 'informal outdoor recreation' and other forms of recreation and neither they, nor the Councils' insurance companies, therefore keep specific records of such claims. Moreover it was often difficult to know how to categorise liability claims that were 'on the boundary'; for example claims that arose from an incident which occurred whilst the claimant was engaged in an informal activity such as walking or cycling but which took place on land that was set aside and managed for recreation, such as a playing field.

Despite these difficulties, the survey provided valuable information on a number of aspects of the Study, including on the scale of actual liability claims currently being made arising

from informal outdoor recreation, the way those claims are being dealt with and on the attitude and approach towards recreation provision by the District Councils. The key findings are set out below.

The scale of liability claims and how such claims are determined

A quarter of responding councils (25%) told us that they have never received any liability claims relating to informal outdoor recreation activities. More typically, however, the majority of councils said they receive a small but fairly consistent trickle of liability claims, of which an average of around one or two claims each year can be expected to relate to informal outdoor recreation activities, albeit that the incidents will generally have occurred on land (such as urban parks or playing fields) that are set aside and managed for recreation.

The great majority of such claims derive from some form of encounter with a man-made feature or obstacle or injuries caused by debris or litter, with typical incidents including walking into a sign, tripping on defective paving or the base of a barrier, a child running into a bench or falling into a ditch, and cuts from sitting on broken glass. Claims relating to the natural state of the land or a natural feature appear to be much less common but can also be received from time to time (e.g. one claimant was hit by a branch falling from a tree, another slipped on wet grass).

Most liability claims relate to relatively minor injuries and the sums sought in compensation were typically less than £2,000. More serious injuries can arise from time to time however, and a small number of examples were given of higher settlements; for example that relating to the injury caused by a falling branch was settled out of court for £25,000.

For those Councils other than the three Councils that are 'self-insured' (see below), it was stated that the final decision on settling or disputing a liability claim rests with the Councils' insurers. (It should be noted that this is at-odds with information received from the Insurance Companies themselves.). Normally this will be done in consultation or partnership with the authority, but we were also told of cases in which the insurance company was prepared to offer the claimant a payment when the Council Officers concerned did not believe this to be justified or strongly disagreed with the proposed settlement.

According to those interviewed, the factors taken into account by the insurance company when considering whether to offer a payment included the extent to which the Council had sought to anticipate and prevent the accident from taking place, in particular whether it had carried out a rigorous assessment of the activity concerned and also had a strong inspection and monitoring regime in place. Setting up and maintaining such regimes is therefore regarded by Councils as an important element in combating liability claims. However, the corollary is that officers are often more reluctant to permit or encourage informal recreation activities which take place over a wide area of land for which the potential risks cannot be easily anticipated or assessed. This clearly results in some Councils being reluctant to provide any opportunities for recreation that cannot effectively be 'managed'.

Several Councils clearly believed that the insurance companies will, on occasions, settle minor claims on purely economic or pragmatic considerations, it being less expensive to do so out of court 'for a few hundred or a few thousand pounds' than to appoint counsel to challenge the claim or to risk a judgment (including the award of costs) being made in favour of the claimant.

Allied to this is a belief, also held by a number of other respondents, that the NI courts in general and individual County Court or District Judges have shown themselves to be biased against public authorities and tend to favour the claimants particularly in relation to claims involving injury to a child or where the claimant was left with visible facial scarring. One Council, for example, had been warned by their insurers that they could expect to lose a case involving an injury to a child, regardless of the merits of the case, simply because a minor was involved; another Council would not risk taking any claims to Court because the reputation of district Judge was that he favoured the individual over the interests of any public authority.

In practice, it appears to be extremely rare for cases to go to court. The vast majority of liability claims will be resisted but if the claimant nonetheless persists the end result will typically be that the claim is settled out of court, albeit sometimes at the very last moment 'on the steps of the courthouse'. The amounts involved are frequently regarded as 'no more than a token payment', of a few hundred or possibly one to two thousand pounds, but occasionally larger sums (of up to £6,000) are involved. Only one higher payment than this was identified; that of the £25,000 relating to the branch incident reported earlier.

Determination of claims by self-insured councils

Three District Councils told us that they have to a large extent become 'self-insured' in recent years, meaning they have agreed to bear a higher voluntary excess (e.g. £50,000) and are responsible themselves for settling liability claims up to this limit. As a result of this change, the Council officers concerned take a more robust approach towards all liability claims that are made. This includes challenging every claim 'on principle' and not settling any claim purely on the grounds of financial expediency. All three Councils consider that (in addition to a significant overall saving in their insurance premiums) this policy has led to a significant overall reduction in all types of liability claims.

Approach towards the provision of opportunities for informal outdoor recreation

Asked about their council's perceptions of the liability risk associated with informal outdoor recreation, 11 respondents (55%) said they regarded the risk as being either a low or very low risk, and another five (25%) that it was 'fairly', 'relatively' or 'generally' low. These views were either based on the officers' experience of receiving very few or no such liability claims or were simply based on 'common sense'.

Despite these views, however, the District Councils' approach to providing recreation opportunities is clearly rooted in a Health and Safety culture; a culture which encourages Councils to think in terms of the provision of specific recreation facilities which can be empirically assessed and for which monitoring and inspection regimes can be set up. Similarly, while the outcome of all individual liability claims appears to have only a very limited effect on the Councils' policies, practices or premiums, the wider perception of operating within a 'claims culture' encourages the District Councils to be very wary, and to permit new activities to take place on council-owned land only after a thorough assessment has been carried out and the necessary record keeping and assessment regimes have been set up.

Of the activities that are regarded as particularly risk prone, it was those which took place on or near water that were the greatest concern, being mentioned by seven respondents (35%) with children being seen as especially at risk. Other risk-prone activities mentioned by one or two councils included mountain biking/scrambling (especially on or near footpaths),

skateboarding and rock climbing. For 45% of respondents, however, there were no specific activities which were regarded as a particular risk.

In addition to carrying out a thorough risk assessment and ensuring on-going inspection and monitoring regimes were set up, the measures to be taken before any new activity was permitted included physical measures where necessary, such as the provision of safety fencing or the exclusion of the public from some areas. Some Councils would also ask the body promoting the activity to take out liability insurance to indemnify the Council (one Council, for example, had permitted horse riding on this basis). Again, the comments made suggest that most Councils think in terms of the provision of 'facilities', rather than more generic 'recreational opportunities', and to set these up in ways which are perceived as giving a necessary degree of control. Nevertheless, and despite these concerns, three quarters (75%) of those who took part in the survey said they believed the consideration of risk had never prevented or affected the provision by their Council of informal outdoor recreation opportunities.

Two of the respondents specifically referred to the issue of responsibility for recreational footpaths. One stated that, while her Council had entered into agreements with private landowners to provide a permissive path and had also agreed to take responsibility for some paths on DoE land crossing part of a Country Park, she was apprehensive that these arrangements potentially complicated the issue of liability in that they introduced the possibility that a claimant could seek to play off one party against the other. One Council was extremely loath to 'take on' footpaths and open spaces because (in their view) if paths were signposted but not then adequately maintained 'the Council would become liable and vulnerable to liability claims'. In neither case, however, did the individual officer or the Council have any hard evidence on which to base their view; rather it was their perception of the risk to which the council was potentially exposed.

Would guidance be helpful?

When asked 'Would the publication of guidance on the actual level of landowners' liability in relation to informal outdoor recreation or reporting the outcome of liability claims that have been recently considered by the courts be helpful to you?' 14 councils (70%) said that it would, with only two being opposed (10%) and one (5%) being neutral. Comments ranged from those who felt that 'it would do no harm' or that, whilst informative, it would be

unlikely to impact directly impact on the council's assessment of risk, to those who were much more enthusiastic believing such guidance would remove the uncertainty about how to proceed or would be 'hugely helpful'.

Amongst other positive comments were that information from the Environment Agency, Forest Service and some Councils could be used to demonstrate the very low level of claims that were received, in practice, when set against the very large number of visitors that were attracted to recreation sites for which they were responsible; and that this information would also be helpful in enabling countryside officers to show to private landowners the very low levels of risk that existed, in practice, in allowing the public to cross their land.

A related suggestion was that guidance directed at members of the public and giving information about what to expect when visiting the countryside could also be valuable, for example to expect paths to be rough and sometimes muddy or slippery and to wear appropriate clothing. In addition to directly informing visitors, such 'official' guidance would be useful in setting a benchmark and thus discouraging unreasonable liability claims from being made or in helping to demonstrate to the Courts the standard of care that visitors can be expected to take to ensure their own safety.

'DUTY OF CARE' EVEN WITH REGARD TO PREMISES
Poppleton v Trustees of Portsmouth Youth Activities Committee

An appeal against a judgement in favour of Gary Poppleton for (a 25% proportion) of the loss he sustained as a result of being severely injured whilst at a purpose built indoor climbing facility and which arose from his miss-use of the facility in attempting a risky leap. The original Trial Judge rejected Poppleton's claim in so far as it related to the state of the premises and was also satisfied that the defendants were under no duty to assess Poppleton's competence or ensure he had any necessary training but upheld the allegation that they were in breach of duty in failing to warn that the thick safety matting might induce an unfounded belief that the climbing wall was safe (hence the 25% award).

In allowing the appeal (and rejecting a cross-appeal relating to the level of the award), Lord Justice May notes that while Tomlinson v Congleton BC was mainly about the application of the Occupier's Liability Act 1984, the speech of Lord Hoffman in particular has thinking relevant to policy considerations underlying cases of this nature. In this case, the risk of falling from the wall was plainly obvious. Equally it was obvious that no amount of matting could avoid absolutely the risk of a severe injury from an awkward fall; and that such a fall was an obvious and inherent risk in this kind of climbing.

He concluded: "There being inherent and obvious risks in the activity which Mr Poppleton was voluntarily undertaking, the law did not in my view require the appellants to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so. If the law required training or supervision in this case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk – as for instance bathing in the sea. It makes no difference to this analysis that the appellants charged Mr Poppleton to use the climbing wall, nor that the rules which they displayed could have been more prominent".

Northern Ireland Water

Northern Ireland Water is a significant landowner not because of the extent of its holdings (1%) but because of its control of the public land in the Mourne Mountains in particular. Certain of its lands relating to treatment plants and some of its reservoirs are not open to the public unless permitted in agreement with a voluntary body. Examples includes a horse riding trail set up in agreement with the Ulster Rural Riders' Association at Killylane Reservoir near Larne and agreements with angling clubs which give controlled access to certain waters for fishing. A further exception is the Silent Valley which is open to the public on a commercial basis and which attracts around 50,000 visitors a year and has some relatively high risk features such the dam walls.

The Company is subject to a large number of liability claims each year but these are almost entirely related to faults with, or works being carried out on, the water infrastructure, for example tripping accidents caused by raised man-hole covers or unsafe excavations. All such claims are challenged, with approximately one-third resulting in a payment being made to the claimant.

Claims arising from informal outdoor recreation (including at the Silent Valley) are almost non-existent with only one such claim being received in recent years. This relates to an incident in 2006 when a walker (a young girl) was injured by a stone falling from (allegedly) the Mourne Wall. The matter is on-going but (in the view of NI Water) the wall in question is not the Mourne Wall and not one for which it is responsible (let alone any considerations over possible liability).

Water NI has no recreation policy for its properties even though the Mournes catchment in particular is extensively used and obviously carries a degree of risk given the need for 38 Mountain Rescue call-outs last year (2010).

The Company's Solicitors advise that a formal risk assessment be carried out before any land is formally opened to the public, in order to identify and deal with any potential hazards which may exist on the land. Such assessments were carried out where access has been agreed with the angling clubs and URRA and these bodies have also been required to limit the use of the facilities to their members and to take out liability insurance to indemnify NI Water against any potential claims.

The Company Solicitor interviewed (who previously had extensive experience in private practice) also shared the view expressed by a number of the District Councils; that the Courts in Northern Ireland have, in the past, shown themselves to be pro-plaintiff in their determination of liability claims against public bodies.

Non-Governmental Organisations that have a land management responsibility.

The National Trust

The National Trust is the largest single private landowner in Northern Ireland. Established in Northern Ireland in 1936, the charity now owns and manages around 12,000 hectares (46 square miles) of countryside and 200 kilometres of the local coastline. It also has a large number of historic properties ranging from large country and mansion estates to industrial archaeology. The National Trust is a charity and is completely independent of Government.

The National Trust reported an average of around 8 claims a year (from approximately 2 million visits) and that these were usually minor involving "slips and trips" at properties. They were not aware of any 'open countryside' claims.

The Ulster Wildlife Trust

No claims were reported by the Ulster Wildlife Trust.

The Woodland Trust

The Woodland Trust cares for 53 woods in Northern Ireland covering 325 hectares (803 acres) of woodland. These woods are distributed fairly evenly throughout the Province, from Kilcooley Wood in Bangor in the east, to the Burn Walk in Strabane to the west.

Their records confirm that they haven't had any third party liability claims in the last five years, and probably longer.

The Royal Society for the Protection of Birds (RSPB)

RSPB is Europe's largest wildlife conservation charity and has ten Nature Reserves in Northern Ireland only 6 of which are open to the public. These range from the 'urban' Belfast Harbour to Rathlin Island. RSPB (UK) has had one visitor claim under Occupier's Liability in the last 7 years. This case, an incident in Wales, is detailed below.

Mills-Davies v Royal Society for the Protection of Birds (RSPB) March 2004

Cwm Clydach is an RSPB nature reserve in South Wales. A visitor walking on a trail cut through the more remote part of the woodland reserve, apparently tripped on a small sapling stump left behind from the path clearance work. He alleged that he fell face-first onto another stump, which caused the loss of sight in one eye. The judge dismissed the claim on the basis that Mr Mills-Davies failed to prove that the accident occurred in the manner alleged by him. However, and more importantly, the judge also went on to consider the scope of RSPB's duty assuming that he had satisfied the court that the accident happened in the way he alleged.

The judge held that even in this case, the claim would still have failed. It was found that stumps such as these were commonplace in woodlands and on woodland trails and the presence of such a stump on the footpath was not a breach of duty under the 1957 Occupiers' Liability Act. This took into account the nature of the area in question, the type of visitor who could be expected there, the small number of visitors who walked in this part of the reserve and the absence of any previous accident or complaint. The judge held that the accident was not reasonably foreseeable and even if it was the risk was very small. It was also unreasonable to require the RSPB to remove all protruding stumps and all other sharp pieces of bracken, sticks and other materials resulting from path clearance and subsequent maintenance work that could conceivably cause a penetrating injury.

Private Landowners.

The Ulster Farmer's Union (UFU)

The Ulster Farmers Union is the largest member organisation /industry association for farmers in Northern Ireland. The UFU was formed in 1918 and currently claims over 12,500 members.

When meeting UFU Officials, reference was immediately made to the case where a lady was injured by a cow (in England) and reputedly received £1 million in damages. The case (McKenzine v Cameron) related to an established Right of Way, the public use of which a landowner must consider, and was held up by the UFU Officials as clearly illustrating the 'hazards' of allowing people to enter onto private farmland and the potential threat that this posed to farmers' livelihoods.

National Farmers' Union Information Statement

While there is a recorded network of over 140,000 miles of Public Rights of Way throughout England and Wales, the National Farmers' Union do not appear to share the UFU's concern over the implications of the McKaskie v Cameron case. In their summary of the judgment and implications, the NFU -writes:

"On 10 May 2003, a Ms McKaskie was seriously injured by cows (with calves) when crossing a public right of way through a field with her dog. Ms McKaskie brought a claim for damages against the farmer, a Mr Cameron. It has been reported that Ms McKaskie was claiming around £1 million in damages.

The Judge, His Honour Judge Howarth, found that on the facts of the case before him, the farmer did have a liability to Ms McKaskie in respect of the injuries that she suffered. The Judge ordered that the damages payable to Ms McKaskie should be assessed if not agreed by the parties.

Does the Judge's decision in this case mean that farmers cannot put cows with calves in fields through which there is a public right of way? No. The fact that the farmer in this case was found to be liable to Ms McKaskie does not in the NFU's view mean that farmers can no longer put cows with calves in fields with public rights of way running through them. The decision of the Judge in this case was based on the particular facts and evidence presented in the case before him. In the copy of the judgment that the NFU has seen, the Judge himself says "I suspect that this decision is in the main based on the particular facts of this case and upon my assessment of the evidence presented to me. In later cases, even where the relevant facts are similar it may well be that the expert evidence called leads the judge to a different conclusion."

What are the implications of this case for farmers? In the NFU's view, this case does not change the existing legal position for farmers in relation to livestock kept in fields through which there is a public right of way.

The UFU said that they had agreed with the decision not to change the current Occupier's Liability law as it was only one of a range of issues associated with access to the countryside. Discussion then focused on those issues including the fear that farmers felt over even a potential claim (and the costs of defending this) with reference being made to the 'claim culture' that they believe exists throughout Northern Ireland.

Other issues raised were those of bio-security and litter and vandalism especially close to urban areas. They were very supportive of what they referred to as 'the CAAN Approach' by which they meant permissive paths, with insurance cover. (Such cover does not apply to short walks). However, they still had concerns about people straying off defined routes.

The issue of dogs not under control was also raised as was the issue of some District Councils not managing the access routes they had.

However, when pressed on the Occupier's Liability issue, they felt that there needed to be more clarity and that this had not been provided by the Environment and Heritage Service information leaflet (undated) widely circulated to the agricultural community. They felt that farmers needed to be protected (through a fund or mechanism) against rogue cases.

Finally, the UFU were adamant that they felt that there must instead be a national priority for public lands to be used for recreational use, one present asking "why should farmers provide access when so much public land is not being used?" They formally requested that this point be highlighted in any report.

In terms of actual claims we stated that we would be following up matters with NFU Mutual and other insurers as no relevant examples were quoted at the meeting.

(N.B. It should be noted that we wrote to and phoned NIAPA on a number of occasions to seeking a meeting but received no response to our requests.)

Responsibilities on the Owner of Land
Lord Hoffman (in the Tomlinson case) said:
"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 paternalistic 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."**

The Insurance Industry

The Study used a recently retired Insurance Executive with a strong recreational background and understanding to undertake research within the Industry. The main format was telephone interviews, to an agreed format, with a range of people and organisations as detailed below.

- Dawson Whyte, who are the largest independent locally owned commercial brokers in NI, have confirmed that they can recall **no incidents** of successful, or unsuccessful claims, being made against landowners by recreational users in the last 25 years.
- Dawson Adair, Insurance adjusters, has **never** dealt with a claim of this nature in the last 25 years.
- Fulton & Downes, distributors of farm feeds, and a major insurer of farms, (now part of Abbey, Bond Lovis) have **no record** of any claims made against their clients arising from ownership of land.
- NFU (farms): the Claims Manager Belfast and the Liability claims superintendent have **never** had a claim of this nature.
- Aviva (who insure many farms and Councils) a representative who has worked in liability claims for over 30 years, (and dealt with all the District Councils for Norwich Union), has **never** seen a claim against a land owner for injuries sustained on property. If they had come across even a small claim, they would have contested it otherwise they might have set a precedent. Further, it is a condition of every insurance policy that all incidents have to be reported, therefore for a public body to settle a minor claim on a "Goodwill basis", would be a breach of policy conditions. However, if the council is "self insured" (has a large excess on their policy) it is possible that this might happen.
- "Open and Direct" have a substantial rural portfolio, but their representative confirms that he has **never** come across such a claim.

In summary, Insurers claim **never** to have not seen even a speculative claim of this nature, and negligence would have to be established by the claimant, before they would deal with it.

Core questions asked and answers received:

1. Are you aware of any cases where successful (or unsuccessful) claims have been made by a recreational user against a landowner? **A: No**
2. Under what circumstances would an insurer consider a client to be liable to a recreational user? **A: None, unless the claim was due to a deliberate action.**
3. Is there a lower level of claim under which the insurer might "settle" rather than go through legal process? **A: No, would contest any such claim.**
4. Are public bodies likely to settle small claims without referral to their insurers on a goodwill basis? **A: No, unless self insured!**

'Access to the Outdoors-the Insurance industry's perception of risk' Scottish Natural Heritage 2008

There has been a long tradition of implied access to Scotland's hills. Since the early 1990s, Scottish Natural Heritage (SNH) has been actively promoting wider access to the countryside. At various stages of this process, public and occupiers' liability has been raised as an issue and a report, Liability and Access to the Countryside (McKenzie, D. et al., 1996), was commissioned and subsequently used to offer guidance to various interests in the debate.

Introduction of the Scottish Parliament brought new impetus to the land reform debate including access rights. The Parliament brought this forward through the Land Reform Bill which included the concept of the 'right of responsible access', governed by a set of principles subsequently to become known as the Scottish Outdoor Access Code (the Code). Since the Land Reform (Scotland) Act 2003 came into force in early 2005 concerns over liability have arisen again. The study examined the insurance industry's approach to providing public liability cover relating to outdoor access in Scotland through a combination of desk-based research and a structured interview programme with a sample of land managing bodies and insurance firms.

Main findings

• Clear trends were identified in the cost of liability insurance since 2000; however, the market has been driven by factors such as the World Trade Centre attacks, changes in the investment basis for underwriting insurance and changes in regulation. No evidence was found that the introduction of the 2003 Act had influenced the general level of premiums.
Public liability insurance is largely rated on the area/size of the insured interest. Specific activities are then considered that 'add on' layers of premium based on risk.
• No evidence was found of recent liability cases involving the Land Reform Act 2003 or out-of-court settlements.
• From the perspective of the insurance industry, the current position is broadly comparable with the situation prior to the introduction of the 2003 Act.
• The insurance industry is reactive in its assessment of risk, i.e. introduction of the 2003 Act is only likely to influence insurance premiums if a raft of claims comes forward.

Part 2: 'Perception is Nine Tenths of Reality' – Changing Realities

Part 1 of this study clearly illustrates the reality of Occupier's Liability legislation in relation to informal outdoor recreation. If we isolate those cases not involving built 'structures' and then those only in what are largely considered 'managed' environments, **there is not a single successful informal outdoor recreation claim on record.**

So why does this and other myths (such as claim culture by recreational users) continue?

Perhaps to understand this, we need to consider further on what basis these perceptions are formed.

In this respect, we feel it would be useful to separate the perceptions of land managers (whose role is to manage public or quasi-public lands) from those of landowners noting the prominence of relatively small private land holdings in Northern Ireland.

Land Managers

In Part 1 of this Study we noted through our research a number of underlying themes. Firstly, was this difficulty on behalf of respondents (generally) in understanding what was meant by 'informal' outdoor recreation.

As stated, there was a general desire on behalf of those interviewed or questioned to think in terms of 'facility-based' recreation. This manifested itself in examples they gave of 'claims' which were almost invariably to do with built structures or areas where the duty of care (to users) would normally be greater (such as at a purpose built facility) and even there (as evidenced by the Poppleton Case, see Appendix 1) they arguably over-estimated their level of responsibility.

For the purposes of this Study, it is thus fundamentally important to again maintain clarity in this regard.

What do we mean by 'Informal recreational use of land' in terms of outdoor recreation?

- The land is being used on a casual basis for recreational activity.
- The land is in a natural or semi-natural state. This includes old tracks or paths.

Clearly understanding this is particularly relevant to land managers (and owners) when we consider the second theme identified at the outset, namely: **a tendency to confuse the concept of Occupiers' Liability with the requirements of Health and Safety legislation.**

We noted that this manifested itself in what were quoted as 'necessary' management practices invariably related to buildings or areas where the risks had been identified and had to be managed particularly with respect to public land with acknowledged public access.

Whilst both occupiers' liability law and the health and safety law require land managers to do that which is reasonable to ensure the safety of those invited or permitted to be on the land, as the Study has noted in the 'natural' environment, the Courts have consistently held that the requirement is for the individual user to accept responsibility for what they themselves do and the hazards resulting from their own activities, rather than for someone else to seek to anticipate or to manage the often unquantifiable risks associated with that environment or activity.

However, the culture of risk assessment, risk management and 'caution' are deeply engrained in the procedures and attitudes of public and quasi-public landowners. Whilst some respondents, notably from local authorities, stated that this did not impact on the provision of informal recreation, there are clear examples where it has and where land managers struggle with the concept of activities happening outside their 'control' or without 'permission'. Whilst the need to control and manage organised 'events' (for all sorts of reasons including environmental protection) is obvious, there is no legal basis for attempting to control that which managers cannot (nor could they be expected to) control.

Such matters have been preoccupying both academics and government policy makers alike because of the known fact that we (as a society collectively) are becoming more risk-averse apart from a small sector of the (primarily) young adult population who have acquired the label 'adrenaline junkies'. It is clear that there needs to be action taken to re-establish appropriate levels of risk awareness in children and consequent self-responsibility in adults.

Whilst the detail of such matters is outside the scope of this Study, such matters are relevant in the context of liability and blame not least because the courts have clearly long established that we have a responsibility for our own actions. The following extracts are included for information in this regard.

Extract from 'Perceptions of occupiers' liability risk by estate managers'
Sheffield Hallam University Research Archive, Bennett, L. and Gibbeson, C.

"in contemporary society the interpretation and application of public safety law is frequently subject to a 'ratchet effect' whereby legal requirement are interpreted ever more cautiously and restrictively. The ratchet effect is, in particular, associated with calls "that more should be done" in the aftermath of an accident that attracts public attention. Commentators see this effect as spurred by the rise of 'risk entrepreneurs' (advisers, who, they claim, have a vested interest in preaching caution and risk avoidance). They believe that by such 'ratcheting', and the preaching of such 'experts', place managers judgments about adequate safety provision are rendered ever more cautious, with corresponding negative effects on recreational access and aesthetic enjoyment of the natural and the built environment. They then conclude that these effects, when combined with fear of media criticism in the event of an accident, and a perception that members of the public are nowadays more likely to claim compensation in the event of an accident, lead to greater caution in place management and, on occasion, withdrawal of access to public space altogether.

Summary of report by Lord Young to the Prime Minister following a review of the operation of health and safety laws and the growth of the 'compensation culture'.

Lord Young's report, entitled 'Common Sense Common Safety' states:

*'The aim is to free business from unnecessary burdens and the fear of having to pay out unjustified damages claims and legal fees. Above all it means applying **common sense** not just to compensation but to everyday decisions once again'.*

Amongst others, the report makes recommendations across these relevant areas:

- Compensation culture
- Insurance
- Adventure training
- Education

Abstract of recommendations:

1. **Compensation culture:**

- Introduce a simplified claims procedure for personal injury claims similar to that for road traffic accidents under £10,000 with attendant fixed costs.
- Restrict the operation of referral agencies and PI lawyers and control the volume and type of their advertising via reviews of their codes of operation by their regulatory bodies.
- Clarify, through legislation if necessary, that people won't be held liable for the consequences of well-intentioned voluntary acts.

2. **Insurance industry:**

- Consultation with insurers to ensure that worthwhile activities aren't unnecessarily curtailed on health and safety grounds. Insurers to prepare a code of practice on health and safety for businesses and the voluntary sector, failing which legislation should be considered.

3. **Adventure training:**

- Abolish the Adventure Training Licensing Authority and replace licensing with a code of practice.

Education recommendations:

- Simplify the process that schools and similar organisations undertake before taking children on school trips.
- Introduce a single consent form that covers all activities a child may undertake while at school.

In Part 3, we will consider possible ways to begin to alleviate the impacts of such matters.

Another perception that the Study has highlighted with respect to the public and quasi-public sector, is that the lower Courts (in Northern Ireland) are (allegedly) often biased against those groups and instead "sympathetic" to Claimants, especially minors and especially when the injury involves permanent disfiguration.

We have picked up some evidence to substantiate this to a degree but suspect that many of the cases concerned are settled 'out of Court' because of this very perception. However, once again such cases relate to facilities (notably Play Areas) but the cumulative impact is that they appear to enforce a notion of a 'claim culture'. As the myth of a 'claim culture' extends to private landowners, we will deal with this and their specific fears next.

Private Landowners

'The Claims Culture'

This Study has found no evidence of a Claims Culture with respect to outdoor recreation. This is reflected firstly in the previously highlighted study (Page 22) carried out in Scotland which stated that "no evidence was found of recent liability cases involving the Land Reform Act 2003 or out-of-court settlements", this in a situation where virtually all of Scotland's landmass is open for outdoor recreation.

It is further evidenced by the feedback we received from the Insurance industry in Northern Ireland (see Page 24) and finally through specific research commissioned as an extension to this Study by Sport NI.

This specific research involved a 'Perception Questionnaire', the full details of which are included at Appendix 2. In essence this showed that across a broad sector of recreational users, all 360 interviewed felt that the management of any risk associated with both their activity and the 'hazards' of the natural environment fell to them.

In terms of risks associated with walls or structures located within the natural environment, only 3 people stated they would attempt to claim compensation if they were seriously hurt. A further 16 said they would 'follow up' a serious injury in some way. Those interviewed had no idea of the legal rights and wrongs; what we sought to determine was the level of this so

called 'culture' which even in relation to built structures amounted to only around 5% of respondents when given an emotive, stated scenario.

However, despite there being no evidence of a 'claims culture' and the reality of the legal situation, it is clear from this Study that private landowners are still likely to feel vulnerable with respect to those using their land for recreation. Even a rogue claim causes then annoyance and potential costs in responding through their Solicitor.

As previously alluded to, progress on developing many 'new' walking routes has required commercial 'insurance' underwriting the use of those routes. Although the absence of any claims suggests this is largely unnecessary it nevertheless gives many landowners the degree of assurance they need.

The Study feels that the issue of giving other private landowners as great as possible a degree of assurance is fundamental to progressing further opportunities for outdoor recreation on private land. However the approach advocated by the Ulster Farmers' Union that priority should first be given to ensuring that land which is already in public ownership is made available to the public, seem to us both valid and feasible.

The Perception of Users

The Questionnaire Survey detailed in Appendix 3 highlighted primarily the need for all hill users to be properly informed in terms of footwear and clothing, changes in the weather and the role and indeed viability of mobile phones as a secure source of aid. Further user information as to when and how to get help, if needed, is clearly necessary.

However, the Questionnaire also clearly illustrated the perception of users (which matched the legal reality), that it is for the individual user to assess the risks oneself and to take appropriate measures to ensure his or her own safety. This was manifested by the clear 100% response in relation to the fact that users know that it is not someone else's fault if they slip, or fall, get lost and indeed get injured.

Whilst some confusion still exists in the minds of a very few around structures, primarily stiles, where there is a presumption that these should be fit for purpose, references to 'blame' were virtually non-existent. 'Path condition', relating to quarry, traditional and constructed rugged or pitched paths, often designed to protect the habitats as distinct from merely facilitating access, were not even mentioned.

Only one adult said they would 'claim' if they were seriously hurt in relation to a structure with a further small number stating would 'follow matters up' but this group was not specific as to what this meant.

As stated in the Report of the Questionnaire, given the mix of users surveyed, there is clearly a widespread understanding of the fact users themselves are responsible for what they do and that even 'structures' are largely treated in their perception as part of the natural environment.

> What exactly is meant by "dangers which are due to the state of the premises or to things done or omitted to be done on them"? This phrase defines the scope of both all the Occupiers' Liability Acts, throughout the United Kingdom. Tomlinson suggests that, at least in the case of adults, the premises must generally be "unusually dangerous" to the claimant as regards a "normal" activity (that is, one that does not have inherent dangers, such as skiing, cliff-dimbing, diving in ponds or lakes, or mountaineering) in order for there to be liability attributable to the "state of the premises". It is not enough that there is a risk of injury on the premises. A mountaineer incurs the risk of stumbling or misjudging where to put his or her weight. That risk cannot properly be attributed to the state of the premises; it is properly attributed to choosing

In fact, it could be argued that even in relation to 'structures', a much more robust approach could be taken by owners if faced with a 'wild card' claim.

'Reasonable' Struthers-Wright v Nevis Range Development Co PLC [2006]

An experienced skier, familiar with the area, was skiing from the summit plateau at Aonach Mor, near Fort William. He fell over or through a snow cornice on a ridge, sustaining fractures to both arms. He claimed that the company managing the ski area and providing the lifts and tows were in breach of the Occupier's Liability (Scotland) Act 1960 by failing to display such care as was 'reasonable' to see that he did not suffer injury. He suggested that signs should have warned of the danger.

The judge, Lord Turnbull, found that the claimant had failed to establish the underlying factual basis for his case. Notwithstanding his rejection of the claim on these grounds, Lord Turnbull went on to consider whether the ski company might have been liable under Occupier's Liability. It was clear from case law that the duty imposed upon an occupier does not extend to providing protection against obvious and natural features of the landscape. Therefore there was no duty to provide fencing, warning signs, or notices. The judge also referred to the Tomlinson v Congleton BC [2004] Case.

Interestingly Lord Turnbull went on to consider whether the ski company would have been seen to have acted reasonably in the event that they did owe a duty of care to the skier under the circumstances. Although it would have been feasible to erect signs along the ridge, a balance had to be struck. It was correct to acknowledge that the area was only used by experienced skiers and that the ski company provided literature and advice that warned of the dangers.

Lord Turnbull also accepted that there were a number of issues as to the effectiveness of warning signs placed in the snow. In particular, if skiers came to expect them, then an added danger would be introduced should such a sign be hidden by snow or blown away.

The judge also emphasized that to place warning signs at regular intervals along the summit ridge would have a significant impact upon the natural beauty and character of the landscape. To have taken this step would have constituted a disproportionate response to the risk said to exist.

The Perception of Government

NI Assembly - Programme for Government (PFG) 2008-2011
We continue to have higher than average mortality from coronary heart disease, cancer and stroke, while obesity levels, particularly among our children, are rising at an alarming rate.

"Sport Matters" The Strategy for Sport and Physical Recreation 2009 – 19
has also identified that one of the key steps for success is: "Review and update relevant public policy frameworks to enable access to, and sustainable use of, publicly-owned land in NI for sport, physical recreation and activity tourism."

The Study authors feel that Northern Ireland has significantly lagged behind other regions in terms of cross-sector approaches to tackling the promotion of healthy lifestyles and creating opportunities through outdoor recreation. Whilst CAAN with those individuals involved in its funding Departments and Agencies have achieved a lot on the basis of an 'un-adopted' 1998 Countryside Recreation Strategy, it is clearly time to have in place a proper strategic framework having the full support and buy-in from all sectors of Government.

The proposed Outdoor Recreation Strategy, of which this Study is but one element of the background research is a first step in that regard but it is clear that a much more dovetailed health and well-being policy agenda is also required.

Let's Make Scotland More Active: A Strategy for physical activity (2003)
Scottish Government's 'Strategic Co-ordination Framework'

"The Scottish Executive is committed to cross-cutting policy (joint working between departments) to deal with a wide range of issues. However, there is a lack of co-ordinated planning for physical activity. There are many different national agencies that could help put the objectives and priorities of this strategy into practice. But, these agencies often have to compete with each other for resources and the initiatives between departments and agencies are often not co-ordinated.

This needs to change. We believe that it is vital to challenge and change how the Scottish Executive and its agencies work to develop this strategy as well as what is done. Putting in place a system to co-ordinate the existing policy-making, design and delivery will be as vital as developing new areas of work.

The cross-departmental representation on the Task Force project team showed that this can happen for forming strategies. We now need an identifiable and accountable cross-cutting (joined-up) structure for putting the strategies into place."

Part 3: A Reality Check - The Suggested Way Forward

"The greater our knowledge increases the more our ignorance unfolds." John F. Kennedy

The original context of this Study was to:

1. Research and compile a list of any successful and unsuccessful cases against a landowner, occupier or manager with respect to recreational users between 1980 and 2010.
2. Research and compile a list of any out of court settlements within a range of public & private bodies between 2000 and 2010.
3. Produce a report for SNI on the findings of the review.

The Study's Authors' rapidly found that all the information we were receiving effectively showed no history of claims and that the few out of court settlements related to structures invariably in a formal recreation environment. To merely catalogue these facts would only have been partly helpful in dealing with the underlying and on-going perceptions, a process which we understood to be the Study's main purpose.

It was therefore agreed with Sport NI that the format would change to that now presented.

In this final Part, 'The Way Forward', it should be emphasised that these recommendations are those of the Study Authors and emanate purely from the discussions and consultations we undertook in determining as best we could the matters in 1 and 2 above and reflected in Parts 1 and 2 of this Study.

Within the time-frame and indeed logistics of this Study it has not been possible to detail these recommendations or expound their ramifications at great length but we feel that their inclusion is helpful in establishing matters for further consideration particularly by all those involved in promoting Outdoor Recreation and producing the proposed Strategy in this regard.

Our recommendations relate to desired actions at a number of levels.

First and foremost, we feel that there needs to be an Assembly Policy Statement on the positive use of all public land for Outdoor Recreation and a right of public access to such lands. Whilst this process has commenced with respect to the largest land-owner (Forest Service) through the passing of the 2010 Forestry Act, this only allows for a right of access on foot.

Sport NI, as reflected in Sport Matters (The Northern Ireland Strategy for Sport and Physical Recreation, 2009 – 2019) and in the current 'Policy Position on Access to the Natural Environment for Sport and Physical Recreation' have taken the lead on a cross-sectorial approach. In testing that policy through on-line consultation, almost 74% of respondents said that the model of the Land Reform (Scotland) Act 2003 (open access with responsible behaviour) was the right approach for outdoor recreation on all suitable public land in Northern Ireland. It is noted that only 3.5% disagreed and the remaining 22% were unsure.

SPORT NI - POLICY POSITION ON ACCESS TO THE NATURAL ENVIRONMENT IN NORTHERN IRELAND FOR SPORT AND PHYSICAL RECREATION

PRINCIPLES

This policy position is underpinned by the following 3 fundamental principles:

- Creating the best possible access to the natural environment for sport and physical recreation must be regardless of race, age, ability or location, so as to encourage a lifelong healthy lifestyle pattern and equitable opportunities for all to participate.
- That increased access must be mirrored by responsible and sustainable usage and therefore users must follow sound environmental ethics such as the Leave No Trace principles.
- That access to private land should principally be through agreement of landowners.

From our research, there appears to be no legal reason why such rights should not be extended and cover all public land. Obviously operational requirements and genuine health and safety concerns will require the management of such a change but overall the net benefit in terms of the health, wellbeing and economic benefits to Northern Ireland society are likely to far outweigh any concerns expressed to us. However, it would be useful to have empirical research specific to Northern Ireland to justify and reinforce this particularly in terms of macro-economics (including savings to the Health Service etc.).

Northern Ireland is the only part of the United Kingdom which has no wider right of access covering areas of private and public land. It also has a very limited Public Rights of Way network; in fact this is miniscule even on a pro-rata areal basis when compared to England and Wales (see below). To emphasise the use of public land would tie in with (and indeed counter) the comments received from private landowners as to why they should be asked to provide public access and bear the risk (which we have established is perceptual) which goes with this.

Rights of Way – United Kingdom

Country	Total size in square miles	Miles of rights of way	Length of rights of way per square mile
England	c. 50,000 sq miles	118,000 miles	2.36 miles
Wales	c. 8,000 sq miles	20,625 miles	2.58 miles
Scotland *	c. 30,000 sq miles	9,375 miles	0.31 miles
N. Ireland	c. 5,500 sq miles	123 miles	0.02 miles

Such a policy statement would also help the operational managers of public lands who are often faced with judgement balance between the 'risks' of allowing or indeed promoting recreational use versus no stated rationale for doing so in the public interest. In such circumstances they assume a cautious approach. Issues raised around the logistics of risk assessments and the resource implications of these are understandable in the context of hard-pressed budgets but it is clear from this Study and legal precedent that if the freedom to use public land was couched in a 'code' for users (as in Scotland for public and private

land), there is no need for such an arduous risk assessment and checking process for natural features.

To help operational managers determine the level and indeed requirement of risk assessments, we feel that clear guidance material should also be produced. This should be done in conjunction with the Departmental Solicitors Office so as they themselves have a closer understanding of the nature of land managers' concerns and the potential for a range of outcomes. We feel that in the public interest, the DSO is best placed to determine if there is any substance to the perception that the Study has highlighted with respect to the public and quasi-public sector, that the lower Courts are biased against those groups.

Whilst the Study found no evidence of any claims culture amongst users, we feel that there are a range of issues around safety, who to contact and when, and about the whole nature of responsible access which need to be promoted to users. Material produced to date has largely been aimed at land-owners but through NGBs of sport and a range of mechanisms, we feel there is need to educate the wider public about their rights and responsibilities picking up on the messages already being promoted by, for example, Leave No trace and from the on-going decisions of the Courts and doing so in 'user friendly' manner.

Finally, whilst much energy has been directed at putting at ease the minds of private landowners over the whole issue of Occupiers' Liability, there still remains an issue over what we refer to as 'rogue' claims and the potential annoyance, costs and uncertainty around even refuting these. We feel there is some value in the provision of a legal advice service in this regard. This would need to be closely managed and vetted and would ideally be done in full partnership with both farming unions. Such advice on specialist matters is commonly available now in all walks of life and is provided on a 'service' level by specialists at a fraction of the cost of direct and individual advice.

Appendix 1: Notes on liability cases.

Tomlinson v Congleton BC and other legal precedents

Application of precedents by the Northern Ireland courts

Northern Ireland has its own judicial system, separate to those which exist in England and Wales, Scotland and the Republic of Ireland. All of these judiciaries apply the doctrine of precedent of *stare decisis* (standing by previously decided rules of law); meaning that once a principal of law has been determined by superior courts, that judgement will be applicable to all comparable future cases unless and until that decision is overturned (by a higher court) or is rendered obsolete by a change in legislation.

Although we were unable to discuss this issue with the Departmental Solicitor's Office, our understanding is that the courts in Northern Ireland will follow as binding the precedents set in cases previously determined by the House of Lords (such as *Tomlinson* below) or, from 1 October 2009, by the UK Supreme Court. Cases determined by a higher court in another judiciary, such as by the Court of Appeal in England and Wales or Court of Session in Scotland, will also be taken into account but, depending on the exact circumstances of the case, may be regarded as 'persuasive' rather than binding.

Approach of the courts towards liability

In practice, and contrary to popular belief, the courts both throughout the UK and in the Republic of Ireland, and especially the higher courts, have long taken a common sense and pragmatic approach to the degree of liability which the owner of any land has towards another person who come onto that land and is subsequently injured in the course of an activity which he or she has freely decided to undertake. This has been the case regardless of whether the injured person is on the land by virtue of an expressed or implied invitation by the owner, i.e. as 'a visitor', or is there without permission as 'a trespasser'.

As long ago as 1907, for example, in *Hastie v Magistrates of Edinburgh* (1907 SC 1102, 1106) the Lord President observed that there are certain risks against which the law, in accordance with the dictates of common sense, does not give protection - such risks are "just one of the results of the world as we find it". Similarly, in *Stevenson v Glasgow Corporation* (1908 SC 1034, 1039) Lord M'Laren noted that "in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures". He concluded that "as the common law is just the formal statement of the results and conclusions of the common sense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by common sense as unnecessary and inconvenient are not required by the law."

The most authoritative recent case, however, is that of *Tomlinson v Congleton Borough Council* (fully summarised below) which was determined by the House of Lords in July 2003. Whilst widely reported as being "a landmark case" and as stemming "the development of a 'compensation culture' in the UK", the ruling of the Law Lords draws on, and is consistent with, earlier cases such as *Donoghue v Folkestone Properties Ltd* (also summarised below). These similarly uphold the principals that the individual must take responsibility for his or her own actions and of *volenti non fit injura* - a willing person cannot be injured (in law).

The *Tomlinson* judgement is particularly valuable with regard to outdoor recreation as it considers in detail the specific provisions of both the Occupiers' Liability Act 1957 (the common duty of care towards a visitor) and of the Occupiers' Liability Act 1984 (duty towards a trespasser), the requirements of which are identical to those applying in Northern Ireland under the Occupiers' Liability Act (NI) 1957 and the Occupiers' Liability (NI) Order 1987. As the further summaries set out below also show, the judgement has been widely applied in other cases involving outdoor recreational activities by the courts throughout the UK and also in a judgement by the Republic of Ireland's Supreme Court.

Summaries of leading judgements

Set out below are summaries of both the *Donoghue* and *Tomlinson* cases and of some of the other subsequent cases which have applied those judgements throughout the UK and Republic of Ireland. As well as cases heard by the Court of Appeal for England and Wales (E&W COA), they include those heard by the Northern Ireland High Court, the Court of Sessions in Scotland and the Supreme Court in the Republic of Ireland. Copies of these and other judgments are freely available online at the British and Irish Legal Information Institute's website http://www.bailii.org/. They can be located by entering 'Tomlinson v Congleton BC' into the search engine.

E&W COA: John Simon Donoghue v Folkestone Properties Ltd (February 2003)

This case both predates and anticipates the House of Lords decision in *Tomlinson.*

Donoghue, a 31 year old professional scuba diver, together with a friend (also a professional diver) decided after midnight on Boxing Day, 27th December, 1997, after spending part of the evening drinking, to go for a swim in Folkestone Harbour. He dived into the sea from a slipway, struck his head on an underwater obstruction, broke his neck and was rendered tetraplegic.

While the area of the slipway was popular with members of the public, both sides accepted Donoghue was there as a trespasser. Close by were steps leading to a landing stage from which, in the summer, children and occasionally adults would enter the water to swim, despite notices stating this was prohibited. Swimming also took place in summer from the slipway although in smaller numbers. The owners, Folkestone Properties Ltd were aware of

this and their security guards had tried to prevent it, including calling the police, but to no marked effect.

When this issue first came to court the judge noted that Donohue's years of professional training and experience reinforced the common sense rule that you should not dive into water unless sure of sufficient depth and the absence of obstructions. He also rejected Donohue's evidence that he thought the harbour was a recognised place to swim, believing instead that Donoghue realised perfectly well that swimming was probably unauthorised but difficult to prevent. Nevertheless he concluded that the underwater obstruction (a series of piles that were submerged for a substantial period each day) immediately adjacent to the slipway were sufficient to constituted a danger 'which creates a risk of personal injury due to the state of the premises' for the purposes of the 1984 Act. That danger was one from which Folkestone Properties Ltd could offer some protection in that, had there been a sign warning that it was dangerous to swim, jump or dive and that there were hidden objects in the shallow water, this would (in his view) have dissuaded Donoghue from diving off the slipway. He therefore upheld the claim, whilst limiting to 25% the amount of damages which Donoghue could recover because of his own contributory negligence.

In their appeal the landowners accepted that they owned a duty of care to those who, they were well aware, swam and dived in the vicinity of the slipway in the summer. They contended, however, that the duty did not extend to Donoghue, 'of whose swimming expedition in mid-winter in the middle of the night they neither knew nor could reasonably have been expected to know'. This was accepted by the Court of Appeal who determined that, in deciding whether a duty of care exists under the 1984 Act, regard must be had to the circumstances prevailing at the time the alleged breach of duty occurred. At the time that Donoghue sustained his injuries, Folkestone Properties had no reason to believe that he, or anyone else, would be swimming from the slipway. Accordingly the criterion of the Act was not satisfied and Folkestone Properties should not have been held under any liability for his accident.

House of Lords: Tomlinson v Congleton Borough Council and others (2003)

This case originated in the High Court, where the trial judge found against the claimant on the grounds that the danger and risk of injury from diving in the lake where it was shallow were obvious and Mr Tomlinson willingly accepted the risk involved. It then proceeded to the Court of Appeal of England and Wales, where the Lords Justice of Appeal held in favour of Tomlinson by a majority of 2:1. However, this decision was reversed by the House of Lords.

The case arose from a visit which John Tomlinson, then aged 18, made with friends to a popular country park in May 1995. Within the park was a lake, a former sand quarry, with sandy beaches from which paddling was both permitted and very popular. Swimming also regularly took place in the lake, although this was prohibited with warning signs stating that it was dangerous and despite strenuous efforts by park rangers to try to prevent it. Wishing

to cool off, Tomlinson ran into the lake, as he had done many times before. On this occasion, however, in diving into the water he hit his head on the sandy bottom, breaking his spine and leaving him tetraplegic. He initially claimed that Congleton Borough Council were in breach of their common duty of care to him as a visitor under the Occupiers Liability Act 1957, but this was later changed to a claim under the Occupiers' Liability Act 1984 (as a trespasser) since Tomlinson was aware that swimming was prohibited. He sought compensation for loss of earnings, loss of quality of life and the cost of the lifetime care he would require as a result of his injuries.

In his leading judgement, Lord Hoffman quotes with approval the comment by the trial judge, Jack J., that 'It seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state'. He notes:

> "In making this comment, [the trial judge] was identifying a point which is in my opinion central to this appeal. It is relevant at a number of points in the analysis of the duties under the 1957 and 1984 Acts. Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, 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 out of what he chose to do and not out of the state of the premises."

Although concluding from this that "there was no risk of any kind which gave rise to a duty (towards Tomlinson) under the 1957 or 1984 Acts" Lord Hoffman nevertheless went on to consider the matter on the assumption that there was. Among the issues identified in this analysis are several which reinforce the conclusion that a landowner cannot normally be held liable for an activity which the participant freely undertakes and that he will only exceptionally be liable towards a trespasser. He notes, for example, that

> "Even in the case of the duty owed to a lawful visitor under the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other."

In *Bolton v Stone* (1951, AC 850) the House of Lords held that a cricket club was not negligent in doing nothing about the risk of someone being injured by a cricket ball hit out of the ground - the club were carrying on a lawful and socially useful activity and to remove the risk would have had to stop playing cricket at that ground. Lord Hoffman continued:

> "This is the kind of balance which has to be struck even in a situation in which it is clearly fair, just and reasonable that there should in principle be a duty of care or in which Parliament, as in the 1957 Act, has decreed that there should be. And it may lead to the conclusion that even though injury is foreseeable, as it was in *Bolton v Stone*, it is still in all the circumstances reasonable to do nothing about it."

With regard to the duty towards trespassers under the 1984 Act:

> "... there is the additional consideration that unless in all the circumstances it is reasonable to expect the occupier to do something, that is to say, to 'offer the other some protection', there is no duty at all. .... Parliament has made it clear that in the case of a lawful visitor, one starts from the assumption that there is a duty whereas in the case of a trespasser one starts from the assumption that there is none."

In *Bolton v Stone* the injured party (Mrs Stone) had not been engaging in any activity; she was merely standing by her garden gate. It was even more true that John Tomlinson should himself bear the responsibility for his own injuries. Lord Hoffman commented:

> " 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."

Similarly:

> ".. It will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them."

While bathing and paddling had been permitted at the Country Park, activities such swimming were prohibited although they continued to be engaged in by a large number of people. To control this problem, plans had been drawn up by the council to destroy the

beach area so as to prevent the public having access to the water, but at the time of Tomlinson's accident had not been implemented because of financial constraints. Commenting on these proposals, Lord Hoffman said:

> "As for the Council officers, they were obvious motivated by the view that it was necessary to take defensive measures to prevent the Council from being held liable to pay compensation. The Borough Leisure Officer said that he regretted the need to destroy the beaches but saw no alternative if the Council was not to be held liable for an accident to a swimmer. So this appeal gives your Lordships the opportunity to say clearly that local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers."

He concludes his judgment with the words:

> "My Lords, for these reasons I consider that even if swimming had not been prohibited and the Council had owed a duty under section 2(2) of the 1957, that duty would not have required them to take any steps to prevent Mr Tomlinson from diving or warning him against dangers which were perfectly obvious. If that is the case, then plainly there can have been no duty under the 1984 Act. The risk was not one against which he was entitled under section 1(3)(c) to protection. I would therefore allow the appeal and restore the decision of Jack J."

Lord Nicholls of Birkenhead agreed with Lord Hoffman's judgement, as did Lord Nicholls and Lord Woodborough, with both adding further justification based on the previous rulings of the Court of Appeal and House of Lords.

Lord Scott of Foscote took a contrary view, however, on the question of whether Tomlinson had been a trespasser at the time of his accident. It had been accepted by all sides that he had entered the Country Park lawfully as a visitor and that he remained a visitor when he first entered the water by paddling. To say that his status changed to that of a trespasser when, having run into the lake, he plunged forward to execute his 'dive' in contravention of the 'No swimming' notices was (in Lord Scott's view) somewhat unreal; he should continue to be treated as a visitor. Nevertheless, even as a visitor, local authority could not be considered to be in breach of its duty of care to Tomlinson and, therefore, he too agreed that the appeal should be allowed.

NI High Court: Julio Ferrari v the National Trust (2004)

Ferrari, a visitor to the Giant's Causeway, sustained serious personal injury when the basalt column on which he had been sitting collapsed, throwing him to the ground and with part of the column falling on top of him.

It was accepted by the court that, although no entry fee was charged, Ferrari was a lawful visitor to the site to whom the National Trust owed a common duty of care under the

Occupiers' Liability Act (NI) 1957, to see that he was reasonably safe in using the premises for the purposes for which he was permitted to be there. Nevertheless, the court dismissed his claim for damages. Quoting extensively from *Tomlinson*, Sheil LJ found that t there was no obvious danger in the Ferrari doing what he did, which was what many other visitors have done before and since the accident. Nor was there any evidence to show that any of the columns had fallen or collapsed since the National Trust took over the site in 1962. There was therefore nothing to show that they had breached their duty under the 1957 Act.

It was noted, however, that now this accident has occurred, the Trust were on notice that some of the basalt columns may collapse if merely stood upon. That puts an onus on the Trust to carry out regular inspections in order to detect possible weaknesses in the columns and to take such remedial steps as are reasonable in all the circumstances to ensure that visitors remain reasonably safe.

NI High Court: Leanne Colette Mary Burke v Southern Education and Library Board and N K Fencing Ltd. (2004)

The plaintiff, a 14 year old schoolgirl, entered the grounds of Brownlow College, Craigavon together with three friends while taking a short cut. Although the front entrance was open, at the rear of the school ground they found their way blocked by a recently erected iron paling security fence and locked gate which they attempted to climb. When Burke attempted to descend from the top she became impaled on the splayed top of the gate and suffered a serious injury to her left arm. She claimed damages for personal injuries, loss and damage against both the SELB and the fencing contractor.

The fence and locked gate were both made up of 2.45 metre high iron palisades with the pales being 'split, fanged and pointed' at the top and are of a type that is widely used throughout Northern Ireland including around schools and government buildings. The specification had been designed to keep intruders out and no consideration had been given to the possibility that children might try to scale the fence from the inside or to the presence of foot and hand holds on that side of the fence. Prior to it being erected, the school grounds had been open and were commonly used by local residents to take short cuts of the type the girls were attempting.

In dismissing the claim, Higgins J stated that he was satisfied that neither the fence nor the gate was dangerous *per se* and that they were well suited for the purpose for which they had been constructed. Assuming the plaintiff to have been a trespasser, the duty of care owed by the occupier in respect of the risk of injury by reason of the splayed tops (if it existed), is to take such care as is reasonable in all the circumstances to see that she did not suffer injury by reason of that risk. The risk posed by the splayed tops if the gate was climbed would have been obvious, even to a 14 year old. In those circumstances the risk was so remote and so slight that it would not be reasonable to expect the occupier to take any steps to prevent such a risk.

The Court also considered the position should Burke be regarded as a visitor to whom the landowner owed a duty of care under the 1957 Act; i.e. to take such care as in all the circumstances is reasonable to see that she would be reasonably safe in using the premises for the purpose for which she was entitled to be there. That purpose would have been to walk along the path, not to climb the gate, and while the school must be prepared for children to be less careful than adults, Burke was well aware that the gate was there for a purpose and was not to be climbed. The school authorities had met their duty by erecting the fence and gate which, it was obvious, should not be climbed. Any claim made under the 1957 Act therefore would also fail.

E&W COA: James Rhind v Astbury Water Park Ltd (2004).

This case was similar to *Tomlinson* in that it involved a young man who suffered severe injuries as a result of diving into Astbury Mere and striking his head on a submerged object, in this case a fibreglass container which was lying on the bed of the lake covered in silt. The appeal was against the decision of the lower court which found that the claimant knew that swimming was prohibited (and, therefore, so was diving) and that the true cause of the tragic accident was the claimant's foolhardy behaviour in running into the lake and doing a running dive into shallow water. There had, accordingly, been no breach of the occupiers' duty of care under the Occupier's Liability Act 1957 towards Rhind as a visitor to the water park.

In the appeal it was argued that (a) in the circumstances of the case Rhind should be regarded not as a visitor but as a trespasser, to whom section 1 of the Occupiers' Liability 1984 therefore applied, and (b) whereas Tomlinson had simply hit his head on the natural bed of the lake, the injury to Rhind had been caused by the fibreglass container. The injury was therefore due to the state of the premises and was one to which section 3 of the 1984 Act applied (i.e. that the occupier could be expected to be aware that the danger existed, could reasonably expect other people to come into the vicinity of that danger and that it was a risk against which he could reasonably be expected to offer some protection).

The appeal was dismissed on the grounds that the evidence clearly established that the respondents were not aware of the existence of the fibreglass container, nor had it been shown they had reasonable grounds to believe that the obstruction existed.

Court of Session (Scotland): Jacqueline Laura Fegan v Highland Regional Council - Appeal against the decision of the Sherriff of Wick (2004)

The pursuer (appellant), who earlier in the day had consumed several measures of vodka, sat down to listen to her personal music player on a bench that was near to the cliff edge and separated from it by an area of long grass. On standing she dropped the player and, stooping to retrieve it, fell over the edge, sustaining very serious injuries. Although Fegan stated that she slipped and fell, the court was unable to determine precisely what had caused the accident.

The court upheld the earlier decision of the Sherriff, that (i) the pursuer had not proved on the balance of probability what caused her to fall from the cliffs and (ii) there was no duty on the defenders to protect the pursuer against natural and obvious dangers, such as the cliffs in question. In doing so the court referred both to *Tomlinson* and to the earlier cases of *Stevenson against Glasgow Corporation* 1908 SC 1034 and *Glasgow Corporation against Taylor* (1922, 1AC 44). It noted that "these cases all affirm the position that you cannot 'expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so'".

NI High Court: Mark Hartop v Western Education and Library Board (2005)

Mark Hartop was one of 19 participants at a residential course at an outdoor pursuits centre run by the Western Education and Library Board in conjunction with the Prince's Trust. The group were given permission to go for a swim in an adjoining lake, but were told that it was a requirement of the centre that everyone must wear a buoyancy aid and a helmet, regardless of their level of experience. Hartop, an experienced swimmer, was amongst the first to be issued with his equipment. He and a friend then went ahead of the group to a forecourt area where, out of sight of the supervisor, he dispensed with his buoyancy aid and helmet before diving from a floating jetty into 1 metre of water, sustaining very serious injury. He accepted in cross examination that this was madness on his part because, although he had looked into the water, he could not see the bottom and because he knew one should never dive into water the depth of which is unknown.

Hartop sought compensation on two grounds; first that the Education and Library Board was in breach of their common duty of care towards him as a visitor under the Occupiers Liability Act (NI) 1957 and secondly that the Board owed him a special duty of care arising out of its supervisory responsibilities in respect of the course. In dismissing the first of these, Morgan J quoted the comment by Lord Hoffman in *Tomlinson* already noted above:

> "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..... "

The risk to Hartop of diving from the jetty had been obvious and inherent in the activity which he decided to carry out and the Council accordingly had no duty of care towards him.

The existence of a special duty of care is more commonly found in an employment relationship or because of an assumption of responsibility to a vulnerable group such as minors. Morgan J took the view that it was not appropriate to impose such a duty in this case and that this claim too should be was dismissed. *Inter alia* this was because the activity in which the group was engaged was entirely voluntary, was recreational and social in character, and because the risks of the activity which led to the Hartop's injury should have been obvious to a person of his age.

E&W COA: Lorraine Ann Clare v Roderick Perry (t/a Widemouth Manor Hotel) (2005)

This appeal was against the judgment given for Mrs Clare who suffered substantial injuries as a result of jumping from a stone wall surrounding the hotel car park onto the public road 6 feet below. The accident was at late at night; Mrs Clarke could not see the surface of the road and drop was greater than she expected. She was found to be 50% contributory negligent, but the hotel was also found to be in breach of its duty to care in failing to fence the drop.

Tomlinson was quoted extensively in the Court of Appeal's judgement along with other cases (including *Daborn v Bath Tramways Motor Company Ltd* (1946, 2 All ER 333, 336): "In determining whether your party is negligent, a standard of reasonable care is that which is reasonably to be demanded in the circumstances.").

The appeal was allowed. In the view of the Court of Appeal the accident arose not as a result of a mishap but as a result of the claimant's deliberate choice to jump off the wall. Nor was it not foreseeable that visitors would choose deliberately to leave the premises by this "unexpected route".

Supreme Court of Ireland: Geraldine Weir Rodgers v the S F Trust Ltd (2005)

This case relates to an appeal against damages of €84,666 awarded by a lower court to Geraldine Weir Rodgers against the S F Trust, a Franciscan Order, as a result of injuries she sustained when, in admiring the sunset, she lost her footing an fell down the cliff edge into the sea.

The primary issues before the Supreme Court - the specific duty of care owned to 'a recreational user' under section 4 of the ROI's Occupiers' Liability Act 1995 and the meaning of the term 'reckless disregard' – are ones which have no direct equivalent in NI legislation. The judgment however draws on and follows the precedent created by the UK courts, particularly *Tomlinson.* These include 'the common sense expectations' (of the Law Lords) 'of persons engaged in activities such as, for instance, mountain climbing or walking or swimming in dangerous areas' and the comment in an earlier Scottish case[1] quoted with approval by Lord Hutton, that there are certain risks against which the law in accordance with the dictates of common sense, does not give protection – such risks are *'just one of the results of the world as we find it'.*

Accordingly, the Court determined that 'the person sitting down near a cliff must be prepared for oddities in the cliff's structure or in the structure of the ground adjacent to the cliff and he or she assumes the inherent risks associated therewith' and that there was no liability attached to the landowner. It therefore reversed the decision of the lower court.

[1] Hastie v. Magistrates of Edinburgh [(1907 SC 1102, 1106)

Court of Session (Scotland): Peter Alastair Struthers-Wright v Nevis Range Development Company plc (2006)

In this case the pursure, Struthers-Wright, sought an award of damages following an accident at Aonach Mor near Fort William for which the defendants were responsible and where they provide skiing services. In the accident Struthers-Wright, who was an experienced skier and familiar with the area, became disorientated in poor weather, fell over or through a snow cornice and down the sheer wall of a corrie.

The claim was dismissed*, inter alia*, because the danger was one which should have been obvious to all who made use of the area for any purpose and because there was no legal duty on the defender to provide protection against natural features of this nature.

E&W COA: James Evans v Kosmar Villa Holidays plc (2007)

Evans, a 17 year old, was severely injured whilst diving at night into the swimming pool of his Greek holiday hotel, operated by Kosmar Holidays plc. The appeal was against the judgement of the High Court which found the company liable for the accident, subject to a finding of 50 per cent contributory negligence.

The circumstances of the accident were very similar to those of *Tomlinson* which was quoted extensively in defence of Kosmar.

The appeal was allowed: Kosmar's duty of care did not extend to guarding the claimant against the risk of his diving into the pool, which was an obvious risk and one of which he was well aware. Nor was there any duty to give the claimant a warning of the risk.

E& W COA: Poppleton v Trustees of Portsmouth Youth Activities Committee (2008)

This appeal was against a judgement given in favour of Gary Poppleton for 25% of the loss he sustained as a result of being severely injured whilst at purpose built indoor climbing facility provided by the Committee and which arose from his misuse of the facility in attempting a risky leap. The Trial Judge rejected the original claim in so far as it related to the state of the premises and was also satisfied that the defendants were under no duty to assess Poppleton's competence or ensure he had any necessary training. But he upheld the allegation that they were in breach of their duty of care in failing to warn that the thick safety matting which they had provided might induce an unfounded belief that the climbing wall was safe, since this was a danger of which they were aware but which was not obvious.

In allowing the appeal (and rejecting a cross-appeal, that the Judge should have found the scope of the appellant's duty was greater than he did) Lord Justice May noted that, while

Tomlinson v Congleton BC was mainly about the application of the Occupier's Liability Act 1984, the speech of Lord Hoffman in particular has *dicta* relevant to policy considerations underlying cases of this nature. In the present case, the risk of falling from the wall was plainly obvious. Equally it was obvious that no amount of matting could avoid absolutely the risk of a severe injury from an awkward fall; and that such a fall was an obvious and inherent risk in this kind of climbing. He concluded:

> "There being inherent and obvious risks in the activity which Mr Poppleton was voluntarily undertaking, the law did not in my view require the appellants to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so. If the law required training or supervision in this case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk – as for instance bathing in the sea. It makes no difference to this analysis that the appellants charged Mr Poppleton to use the climbing wall, nor that the rules which they displayed could have been more prominent".

NI High Court: Sean Jude McKinney (a minor) v Rev Fr Hugh Kennedy for the Trustees of Sacred Heart Primary School (2008)

Sean McKinney claimed damages for personal injuries arising out of an accident which occurred when, aged 8, he and a number of friends climbed through a gap in the school fence during the school holidays to play football. In the course of the game the ball went onto an adjacent flat roof and McKinney climbed onto the roof to retrieve it. Although he had avoided it on the way up, on the way down the boy's left hand came into contact with a devise known as 'rota fencing' comprising a series of sharp metal blades from which he suffered severe cuts and lacerations. The device had been fitted to the head of the downpipe on the advice of the school's architects to deter climbing following a series of break-ins. It was claimed that the school had failed either in their duty of care to McKinney as a lawful visitor under the Occupiers' Liability Act (NI) 1957 or, alternatively, in their duty to him as a trespasser under article 3 of the Occupiers Liability (NI) Order 1987.

As a previous pupil, McKinney was aware that access to the grounds was prohibited during the school holidays. Although the boundary fence was frequently breached, the school produced evidence to show that it was regularly inspected and steps taken to repair the breaches whenever they occurred. McCloskey J concluded therefore that the boy did not have the school's implied permission either to play football or to climb onto the roof and, therefore, that no duty of care arose under the 1957 Act.

The Judge then went on to consider each of the three qualifying conditions set out in Article 3 of the 1987 Order, having regard in doing so to the House of Lords decision in *Tomlinson* and to the Court of Appeal's decisions in *Donoghue v Folkestone Properties* and *Ratcliffe v*

McConnell and Others. He concluded that both the first and second tests were met: the device, by virtue of its design, was clearly a danger and the school were plainly aware of its existence. Since it had been fitted following a series of intrusions, including onto the flat roof, the School could also be expected to anticipate that a trespasser might go near the danger. But with regard to the third test - that the danger was one which, in all the circumstances, the School could reasonably be expected to offer some protection against – he concluded that 'The risk [of McConnell's injury] could in theory have been prevented, or reduced, by the provision of some kind of barrier. Such elaborate steps could not reasonably have been expected of the Defendant in the circumstances. The fitting was itself a barrier and it is common case that it operated as a deterrent. I have held that the risks which it posed upon contact were obvious. ..... Thus the Plaintiff fails at the third, and final, hurdle'[2].

NI High Court: Amanda Proctor v George Young, Coleraine Borough Council and another (2009)

Amanda Proctor was employed by George Young to exercise race horses. In August 2000, aged 28, she was thrown whilst riding on Whiterocks Beach, Portrush, apparently after the horse stumbled in a hole, sustaining catastrophic personal injuries. The issue at the trial was the liability or otherwise of Coleraine Borough Council as lessee of the beach, both under the Occupiers' Liability Act 1957 and the Workplace (Health, Safety and Welfare) (NI) Regulations 1993.

In determining that there had been no breach of duty under the 1957 Act, Gillen J quoted extensively from *Tomlinson* including Lord Hoffman's statement that:

> "… The law does not provide such compensation on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault."

Exercising horses takes place on beaches all over the British Isles and whilst there are risks inherent in this activity, these are no more dangerous than a host of other activities. Proctor herself recognised there was an element of risk; as an experienced horsewoman she was also well aware of the presence on bumps and depressions, including the likelihood of holes dug by children on this particular beach. This was, accordingly, a classic case of *volenti non*

[2] While McClonskey J dismisses the claim, the way his conclusions are expressed and comments made throughout the judgement suggest that he came to this decision reluctantly – a reflection perhaps of the sympathy which the Courts in Northern Ireland are said to regard cases involving injury to minors, especially where visible scarring has occurred. Unusually, he also sets out in detail the amount of damages that would have been awarded (£45,000) had the claim succeeded and how these would have been calculated.

fit injura (a willing person cannot be injured); Proctor had made a genuine and informed choice and there was no duty in common law to protect her against an obvious risk.

With regard to claims, made on behalf of the Proctor, that existing notice on the beach should have been altered to forbid horse riding at certain times of the year or to forbid horse riding at speed due to holes in the sand, Gillen J noted that "A warning sign would have told her nothing that she could not see for herself or of which she was unaware. The dangers, if that is what they were, were obvious and were completely appreciated by this plaintiff. ... It was the activity in which she was engaged, not the terrain that created the danger." Similarly, there was no need to zone areas of the beach to separate horse riders from other users.

The claim under the Workplace Regulation was similarly dismissed. Gillen J. commented that "the 1993 Regulations must be interpreted in a manner that will not involve a considerable departure from the principle of imposing liability upon those most responsible for the safety of workers. It seems to me therefore that Parliament cannot have intended that a public body such as this Council and those responsible for other vast tracts of areas such as National Trust properties were intended to be made responsible in circumstances where they may not even have known of the presence of other employees or the precise tasks they were performing."

E&W COA: Harvey v Plymouth City Council (2010)

This case concerns a claim for liability under the Occupiers' Liability Act 1957 relating to land owned by Plymouth City Council which had been used by youngsters as an informal recreation ground. At the edge was a 5.5 metre drop onto a car park. A chain link fence along this boundary had not been maintained and had been pushed down to about 65 centimetres. Returning from a night spent drinking, Harvey, a 21 year old male, leapt out of his taxi leaving others to pay the fare, ran across the land, tripped over the fence and fell over the edge into the car park. He suffered serious injuries.

When the case first came to court the trial judge held that, because of the way the land had been used by the public, the City Council had implicitly granted a license for recreational use and that Harvey could therefore be regarded as a visitor for the purposes of the 1957 Act. Also that Harvey's actions were, in the broadest sense, foreseeable; there was physical evidence of nocturnal activities by local youths of which the Council, as occupier, should have been aware, and that it should have taken steps to prevent the accident by installing a secure fence and by removing the tripping hazard in this dangerous location. Liability was awarded although contributory negligence was assessed at 75%.

In overturning this decision, the Court of Appeal held that the question was not whether Harvey's actions might have been foreseen, but whether they were something to which the Council had implicitly agreed to. When a Council permits the public to use its land for recreational purposes it consents to what were described as "normal recreational activities

carrying normal risks". This did not extend to reckless activities such as running around in the dark while drunk, and Harvey was not therefore a visitor at the time of the accident.

Although the alternative question of whether the Council had a duty to Harvey as a trespasser under the Occupiers' Liability Act 1984 was not put before the Court, legal commentary on the decision suggests that a claim on these grounds would similarly have failed.

Appendix 2: Perceptions Questionnaire for Sport NI

Survey Report May 2011

Background:

This 'Perceptions Survey' was commissioned by Sport NI as an 'add-on' to 'A Review of Occupiers Liability Cases with respect to Outdoor Recreation in Northern Ireland' commissioned in December 2010. The aim of that review is to provide robust and accurate information on the actual cases with respect to Occupiers' Liability and recreation in Northern Ireland and to update and inform on Case Law. The underlying issue, particularly when considered in the context of progressing a new 'Outdoor Recreation Strategy for Northern Ireland' is that many land owners and managers continue to cite concerns over liability with respect to access to the countryside for outdoor recreation.

In discussion with Sport NI, it was considered fundamental in further addressing this issue that the perception and attitude of recreational users towards risk, responsibility and how they would behave if injured in the countryside were all important factors which themselves required some research. It was felt this was necessary because despite the main Study showing no actual basis for concern based on the legal background and the attitudes of the Courts, arguments were still being made by landowners and managers regarding 'a claim culture' and the need to take often excessive precautions in this regard. This survey was designed to at least give some insight into the reality or otherwise of such arguments.

Structure and Methodology of the Survey:

The format was that of an 'observational' and questionnaire based interview, targeting a random but broad-ranging number of users at two locations on two separate days.

The locations (the first bridge on the Glen River, Donard Park, Newcastle and the bottom of Trassey Track, Clonachullion, near Bryansford) were deliberately chosen. The rationale was that this would give a wide cross-section of users from serious 'hill-walkers' to those who were approaching outdoor recreation on a much more casual if not 'first time' basis. This indeed proved to be the case with a considerable number of respondents targeting the 'challenge' of Slieve Donard particularly given the weather conditions (dry and sunny) on the first day of survey which was Easter Monday.

The same locations were to be subject to a follow up survey on the May Day Bank Holiday a week later but this was postponed until the following Saturday (7th May) because of the fire warnings issued by the Fire and Rescue Service in the days after Easter Monday when a large number of gorse and heathland fires occurred in the Mournes. May 7th was overcast and cooler and there had been some recent rain and this contrast in conditions was also helpful.

Some 360 individuals or group members were surveyed. The 'observational' aspect, for which the survey team had been trained, related to: appropriate clothing and footwear (given the terrain and weather conditions); the approximate age of those surveyed with a desired wide cross section; whether the respondents were male or female, and if they were part of a group, the size of that group.

The actual questionnaire element was designed to last no more than 5 minutes as this was felt to be the most time respondents would wish to be curtailed especially in certain weather conditions.

Five main questions were asked with the potential for seeking refinement or elaboration of the answers and allowing individual comment at the end. The main questions were:

1: What activity are you undertaking? And how long do you intend being out?

2: Do you think what you are doing is in any way 'risky'? If so, what are those risks?

3: If you were hurt (a sprained ankle for example), what would you do?

4: Whose fault would it be if you were hurt?

Depending on their answer; Do you think you could claim compensation from anyone? If so, whom?

5: If you were injured climbing a wall, on a barbed wire fence, or crossing stepping stones on a stream, what could or would you do in those circumstances?

This last question reflected concerns expressed in the main Review by landowners and managers about 'structures'.

The Survey Findings

360 surveyed.

A: Observational Aspects

Appropriate clothing and footwear:

- 230 were considered to be properly attired and equipped for the conditions and terrain.
- 130 were in casual or 'normal' clothing with the biggest issue being footwear. The good weather on Easter Monday accounted for probably larger numbers in this category notably on the Glen River.

Age of respondents:

up to 10	10 to 15	16 to 25	25 to 40	40 to 60	Older	Acc up to 15
9	19	65	152	96	17	18

Note: Those included in the category up to 10 years were with a parent or parents and were free to answer.

Sex of Respondents

Male	Female
221	139

Group Size which respondents belonged to:

Yes	Alone	Size	10	8	6	4	3	2	7	5	11
330	30		7	9	14	52	65	136	24	30	2

The higher number of respondents in groups of 2 can largely be attributed to many instances where both people undertook the interview.

B: Questions, Answers and Comments

1: What activity are you undertaking? And how long do you intend being out?

Activity:

Walking	Walking Dog	Climbing	Nordic Walking	Running	Camping	DoE Overnight	Cycling\ Mtn Biking	Rock Pool	"Exploring"
277	24	12	2	4	10	15	11	1	4

"Exploring" was exclusively used by the 10 to 15 age group.

Length of stay:

Answers (apart from the majority of walkers) were not always precise.

Up to an hour	61 including most dog walkers
Around two hours	63
Three or more hours	189
Overnight	25
Unsure	22

2: Do you think what you are doing is in any way 'risky'?

Yes	No	Unsure	A little
88	236	10	26

If so, what are those risks?

Many respondents gave multiple answers. A few who said there were 'no risks' then stated 'falling' (but that they wouldn't fall!).

Heart Attack	1	**Slippery**	15
Lost	9	**Hypothermia**	5
Falling\ twist ankle	99	**Death**	1
No phone signal	3	**Equipment failure**	1
Fires	4	**Dog hurt**	3
Broken glass	2	**Risks but don't know**	2
Weather	14		

3: If you were hurt (a sprained ankle for example), what would you do?

First Aid Kit	51	**Survival bags**	3
Help from group	59	**Get down**	47
Use mobile phone	212	**Use whistle**	9
Mountain Rescue	53	**Walkie-talkie**	7
Help from others	44	**Cry**	1

Virtually no one made reference to getting a signal on their mobile phone and in many cases it was the only response they gave as to what they would do.

4: Whose fault would it be if you were hurt?

Mine	**Someone else (and who?)**
360	0

5: If you were injured climbing a wall, on a barbed wire fence, or crossing stepping stones on a stream, what could or would you do in those circumstances?

Own Fault	**Make Claim**	**Notify Authorities**	**Follow up (in some way)**
339	3 (2 of whom under 15)	2	16

Those 'notifying the authorities' or 'following up' made reference to the need for the maintenance of stiles and that they would only follow up if they were seriously injured by a 'structure' collapsing and them being hurt to the degree that they needed to take time of work. They made no direct reference to 'making a claim'. Some actually asked if there was anyone they could claim from.

A majority of respondents stated that no matter what, you were responsible for your actions.

General Comments Received (unprompted).

- Put signs in Car Parks about general risks (3 responses)
- Too much litter (8 responses)
- Broken Glass (3 responses)
- High number of people going up Donard wrongly dressed.
- More access to Forest Service land (2 responses)
- People need to report dangers (2 responses)
- No (to a) National Park
- Need more stiles
- Need a tarmac path to top of Slieve Donard (1 response)

Summary Points.

1. The survey highlights the need for all hill users to be properly informed in terms of footwear and clothing, changes in the weather etc. It could be argued that an overly high proportion thought there were no risks associated with their activity rather than acknowledging any risks and acting accordingly. Some of this could be down to the likelihood that a higher proportion of inexperienced users were surveyed given the Bank Holiday and the good weather. Despite this, the understanding of the need to assess the risks oneself and to take appropriate measures is highlighted by the clear 100% response in relation to the fact that they (the users) know they are responsible for their own safety.

2. Paradoxically, there were a very large proportion of respondents (almost 60%) who felt that their risks were adequately covered by having a mobile phone. Virtually no-one mentioned reception and only a few people actually said who they would phone if they had reception (999 or Mountain Rescue).

3. There seems to be no general appreciation that Mountain Rescue services are a voluntary service and those citing Mountain Rescue rarely stated 'if I had to'. Again, perhaps a wider public understanding is required in this regard.

4. References to 'blame' were virtually non-existent in terms of structures with only a few commenting on the need to maintain stiles. Path condition was not mentioned.

5. In terms of 'claims', there was only one adult who categorically said they would 'claim' if they were seriously hurt. (They didn't say from whom!). The small group who said in a vague way that they would follow matters up were not specific as to what they would or could do and again this was in respect of what they referred to as serious injuries. Given the mix of users including a higher proportion who were not regular hikers, this re-enforces the conclusion that there is no mass of people out there waiting to make a claim, in fact the survey clearly shows that all the users understood that they themselves were responsible for what they did and that even 'structures' were treated in their perception in the same way as the natural environment. To quote one respondent, "you need to make the judgement yourself".