

**The impacts of the Occupiers' Liability
legislation in Northern Ireland on outdoor
recreation**

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Report of the survey of District Councils

April 2011

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Contents

Introduction: Aims of the survey and survey methodology	3
Changes in insurance cover	4
Assessing liability claims in practice	4
The scale of liability claims	6
Determining the outcomes.....	7
Willingness to settle out of court	8
Experience of the self insured councils.....	9
Effects on the council's policy or practices.....	9
Perceptions of the liability risk	10
Activities which are considered to be risk prone	11
Effect on opportunities for informal outdoor recreation.....	13
Would guidance be helpful?	14
Appendix 1: Interview questionnaire	17

Introduction: Aims of the survey and survey methodology

This is a technical report of a survey of district councils in Northern Ireland that was carried out as part of a study, commissioned by SportNI, to assess the impacts of Occupier's Liability legislation on the provision of facilities for informal outdoor recreation.

In common with other elements of the study, the aims of the survey were, first, to gather data on the number of liability claims relating to informal countryside recreation that are being made or threatened against district councils as recreation providers, the way such claims are determined and their outcomes, and secondly, to explore officers' perceptions of the issue of occupiers' liability and the how this may influence in practice the provision of further informal recreational opportunities. To achieve this, we sought to identify the officers directly concerned with handling any relevant liability claims in each of the 26 district councils and to gather information from them by means of a pre-arranged, semi-structured telephone interview that would also allow the key underlying issues to be identified and explored. A questionnaire based on the script that was used to guide each interview is at appendix 1.

In practice this approach was only partially successful for a number of reasons:

- It proved difficult to make contact with the officers concerned in a minority of the authorities whilst in others the officer had been in that post for a relatively short period of time and had only a limited knowledge of the subject or the previous claims history;
- The officers that were interviewed did not, in general, draw a clear distinction between 'informal outdoor recreation' and other forms of recreation. Neither the councils nor their insurance companies keep specific records of such claims.
- A number of the officers were unwilling to engage in a semi-structured discussion or said they were unable to provide some of the information sought (e.g. on the number of liability claims and their outcomes). Some of these however agreed instead to complete a written questionnaire based on the interview pro-forma (shown at appendix 1).

Information was nevertheless obtained from a total of 20 district councils, with many of the officers concerned also being willing to discuss the underlying issues often at some length. We are most grateful to all of those who took part in the survey. The findings are set out below.

Changes in insurance cover

To establish at the outset whether the councils' liability insurance cover was static or subject to change, respondents were asked if they were aware of any changes that had been made over the past ten years in either (a) the level of insurance cover relating to informal outdoor recreation, (b) the type of cover (e.g. in relation to specific activities), or (c) the cost of liability insurance premiums? Nineteen of the councils answered these questions, although several could do so only for recent years. For 17 (85%) the position was broadly static with only two councils reporting a change in the level of cover (both having increased their maximum cover from £5 million to £10 million) and none reporting any changes regarding the type of cover. Similarly, eleven of the councils (55%) said the premiums were broadly static or could fluctuate both up and down, with three (15%) reporting a slight increase and three (15%) a slight decrease.

Two of the councils (10%) however reported that they had become largely 'self insured' five and three years ago respectively - meaning that the council had agreed to accept a much greater excess (of £50,000) and to settle claims below this limit itself – and that this change had resulted in a significant reduction in insurance premiums. The differences which this status, and that of a third council which was also found to be self insured, made in the handling of liability claims is reported more fully below.

The overall conclusion from this section of the questionnaire, however, is that the issue of informal outdoor recreation has no impact on the level, type or cost of local authorities' liability insurance.

Assessing liability claims in practice

The next part of the interview or questionnaire asked whether the respondent was aware of any liability claims having been either made or threatened (either against the Council or

anyone else) relating to informal outdoor recreation. We then went on to try to probe each such incident in more detail. This included:

- the nature of the incident (i.e. what was alleged to have happened to give rise to the claim or threatened claim);
- whether it was the council or the council’s insurance company that ultimately decided how the matter should be dealt with;
- what was the outcome and why was this course of action chosen;
- did it have any subsequent effect on the council’s policy or practices.

A number of difficulties arose however in gathering this information in practice. As noted already, many of the councils were unfamiliar with the concept of informal outdoor recreation or had difficulty in envisioning what activities this might cover, while neither they nor their insurance companies kept records in a form which allowed such claims to be readily identified. Moreover, the majority of the respondents said their councils were responsible only for areas such as urban parks, recreation grounds and sports pitches. Accidents clearly could (and did) take place in these areas involving members of the public while engaged in informal recreation activities such as simply walking, cycling, admiring the view or having a picnic, and which did not involve the use of ‘facilities’ as such. The majority of the reported incidents would appear to fall into this category. However, the fact that the land in question was set aside and managed for public recreation as distinct from the ‘ordinary countryside’ is likely to have had a bearing both on the propensity for the injured party to make a liability claim and the likely outcome of that claim in practice, not least because (given that there is at least an implied invitation to use the land for recreation) the duty of care towards a recreational user would be higher.

A further factor was that a number of the officers concerned had only been in post for a comparatively short period of time and had little or no knowledge of the previous claim history.

For all of these reasons, the findings set out below should be regarded as being broadly indicative rather than a precise record of the scale and nature of the liability claims made against district councils in recent years relating to informal countryside recreation. This does not, however, detract from the main conclusions that can be drawn from them, as set out in the full study report.

The scale of liability claims

Eighteen of the twenty district councils (90%) were able to provide information about the scale and outcomes of the liability claims made in respect of informal outdoor recreation although these varied in the periods that were covered and the amount of detail they were able to provide.

Five of the respondents (25%) were not aware of any such claims being either made or threatened against their councils in recent years. But the more typical picture was of a steady trickle of liability claims being received of which a small number, roughly one or two a year, would be 'serious claims' (i.e. claims that would subsequently be pursued) and which related to informal activities such as walking or cycling, albeit this may be on land that was set aside for recreation¹. While these covered a variety of different types of incident, the great majority involved some form of encounter with a man-made feature or obstacle (e.g. 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). Others related to injuries caused by debris or rubbish (e.g. 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, two specific examples being that of a claimant who was hit by a falling tree branch while in a county park and another who slipped on wet grass when taking a short cut.

¹ A number of councils said that it was common for solicitors to write routinely to everyone with an interest in the land whenever they were asked to deal with an incident involving an alleged injury to a member of the public. To this extent, therefore, the threat of a claim being made was a relatively frequent occurrence. However the standard response would be to reply denying any liability. This would normally be the end of the matter and only a minority of cases would subsequently develop into a formal liability claim.

For the most part, these claims related to relatively minor injuries and the sums sought in compensation were typically no more than one or two thousand pounds. Two more serious claims however were that relating to the falling branch (which was settled out of court for £25,000), and a claim relating to a rider who was paralysed from the neck down after being thrown from her horse while exercising on a beach. In that case, although the claim against the district council for negligence (under the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993) was eventually dismissed, the council say they incurred legal fees in excess of £100,000.

Determining the outcomes

Sixteen of the 20 respondents (80%) provided detailed information on how the outcome of any liability claims would be determined and the factors that would be taken into account. For the majority of these (12 councils, or 60% of all responding authorities), the final decision invariably rested with the insurance company, albeit that it was the council that would usually be responsible for investigating the matter. While the majority of these respondents also referred to the council and insurance company as working in partnership (for example, to there being 'mutual trust' or to the final outcome being 'a joint decision') there was, at the same time, an acknowledged that determining whether to settle or reject a liability claim could sometimes 'be a difficult judgement call for' the insurers.

Two respondents, however, said they believed that their insurance company had been prepared to settle claims out of court even when the officers concerned did not consider this to be justified and had strongly disagreed; a third respondent that he 'would not be surprised' if that were the case. Another referred to a liability claim, still outstanding, concerning a young child who had injured himself by running into a park bench which the insurance company had intended to settle. They had been pressed by the council (and eventually agreed) not to on the grounds that there was nothing the council could have done to prevent the accident from taking place.

A further factor which was again referred to by a number of respondents and which reflects an underlying health and safety ethos was that the insurance companies would be more likely to settle a claim if the council did not have a rigorous inspection regime in place, and

which meant that it could not therefore demonstrate that the council had endeavoured to anticipate and dealt with the problem before an accident occurred. Setting up and maintaining such a regime was therefore also regarded as an important element in combating liability claims and several of the officers said their councils were now in a much stronger position to resist such claims than they had been previously because they tightened up on their assessment, inspection and monitoring procedures. However, the corollary of this is that officers may be more reluctant to permit or encourage activities such as informal outdoor recreation especially over a wide area of land and where the potential risks cannot be easily anticipated or assessed in this way.

Willingness to settle out of court

Underlying these and several of the other comments made was a widespread belief that the insurance companies would, on occasions, be prepared to settle a claim based purely on 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 the respondents that the NI courts in general or individual county court or district judges were frequently biased against public authorities and would tend to favour the claimants. This was particularly so in relation to claims involving injury to children or where the claimant was left with visible facial scarring, however minor. In the specific case referred to above, for example, the insurance company had predicted that when the matter did eventually come to court the judgement would be against the council simply because the injured party was a child, who would therefore be treated sympathetically and given the benefit of any doubt. Another respondent said that her council would not risk taking any claims to court because the reputation of district judge concerned in favouring the individual over the interests of any public authority.

In these circumstances it is not surprising that the respondents overwhelmingly reported that it was extremely rare for cases to go to court. The vast majority of claims would be resisted but if the claimant nonetheless persists the end result would typically be that the claim would be settled out of court, albeit sometimes at the very last moment 'on the steps of the courthouse'. The amounts involved would frequently be regarded as 'a token

payment', of a few hundred or possibly one to two thousand pounds, but occasionally larger sums (of up to £6,000) were involved. Only one higher payment was identified; that of £25,000 for the injury sustained when the claimant was hit by a branch falling from a tree.

Experience of the self insured councils

Although only a very limited sample, the survey suggests that the approach of the three council (15%) that have opted to bear a much higher voluntary excess and who therefore regard themselves as self insured is significantly different from other councils in that each will strenuously oppose, on principle, all liability claims that are made. Every claim will be thoroughly investigated, with the council only rarely being willing to settle out of court and never on the grounds of financial expediency.

All three councils report that, after adopting this more rigorous approach, there has been a significant long term decrease in the number of liability claims (for all areas of the council's activities) as word has spread among local solicitors. There has also been a significant reduction in the councils' overall insurance premiums.

Effects on the council's policy or practices

Only two of the respondents (10%) said that outcome of these liability claims had a direct effect on the council's policies or practices. Both had tightened up on the council's record keeping and had introduced or improved its inspection regime. This in turn had allowed the council to become more pro-active in challenging claims, resulting in fewer claims being made. A further one authority (5%) took the view that the incident in question (of a walker being injured by a 'walking for health' sign) had been a freak accident. It already had an inspection scheme in place and had considered extending this to cover similar eventualities should they arise in the future, but had concluded that the time and on-going administrative effort in doing so would not be justified.

As noted above, the three councils that were self insured believed that their policy of rigorously challenging every claim 'on principle' had resulted in a significant long term reduction in all types of liability claims being made

Perceptions of the liability risk

In addition to seeking information on the level and outcomes of liability claims, the survey also examined the councils' perceptions of liability risk, the activities (if any) which are considered to be particularly risk prone and whether the consideration of risk had never prevented or affected the provision of informal recreation opportunities.

Asked about their council's perceptions of the liability risk, 11 of the 20 respondents (55%) said they regarded informal outdoor recreation as being either as low or very low, and another five (25%) that it was 'fairly', 'relatively' or 'generally' low (Figure 1). Typically, these views were based on the officers' experiences of having previously received either no claims or very few claims in practice despite the large numbers of people involved, or was seen 'as common sense' based on the perception that 'people are generally sensible and make allowances for the environment they are in' or that there was 'little to go wrong'. One officer also commented that his attitude had been influenced by that of the insurance company's very relaxed approach towards an organised walking festival; however another warned that his views may not be shared by colleagues. They would, he felt, be more swayed by the 'lurid publicity' and the 'atmosphere' of being in a claims culture generated by reports in the press.

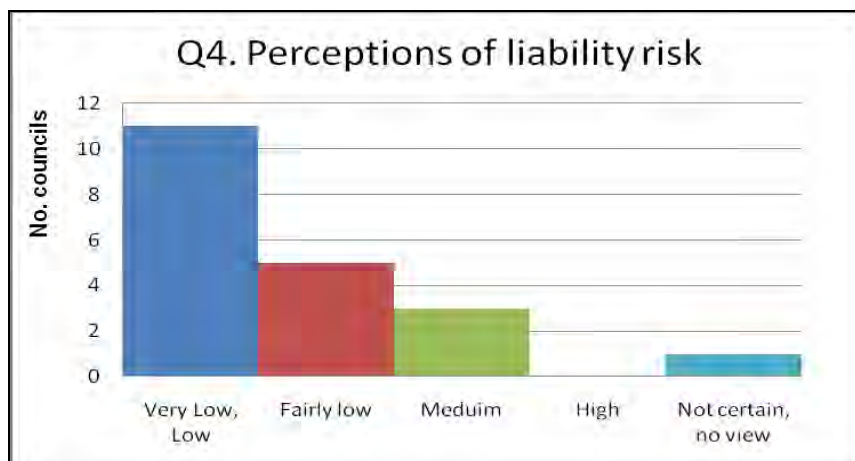


Figure 1: Perceptions of liability risk

This 'atmosphere' was also reflected in the views of 3 further respondents (15%), one of whom commented that her council's general perception was that society is becoming more litigious and that this 'was confirmed anecdotally by other sources', and two who rated the

risk as being medium. Both of these appeared to reflect the Council's experience in other areas; the one officer commenting that 'People in this area are very litigious. Claims are defensible but are still being made', the other that she was aware that 'people do injure themselves' (in enjoying informal countryside recreation) although she had no direct experience of any claims being made.

The remaining respondent (5 percent) was uncertain and declined to express a view.

Asked whether their perceptions of the liability risk associated with informal outdoor recreation had changed in recent years, and if so how and why, 17 of the 20 respondents (85%) said that it had not. Two of these qualified their answers by noting also that their councils had tightened up on their assessment and monitoring regimes and that this had further served to discourage claims from being made or had put the council in a stronger position.

Of the two councils that reported a change, one council (5%) considered that the risk had reduced – from high to medium – a fact which it attributed this to the council's change in approach three years ago when it became self insured. The growing awareness among local solicitors that it would now challenge every claim 'on principle' together with the reduced availability of legal aid meant that it was now much less likely to receive speculative claims. As noted above, however, another one of the respondents (5%) believed that 'society is becoming increasingly litigious'. She therefore regarded the risk as increasing albeit that the council had no direct experience of claims relating to informal countryside recreation.

As with the preceding question, one council (5%) did not express a view.

Activities which are considered to be risk prone

In the next question, respondents were asked if there were any specific informal outdoor recreation activities that take place on council owned land or which the council might be asked to permit which were considered to be particularly risk prone. Nine of the 20 councils (45%) said there were none, but while seven of these replied unequivocally, two of the responses were qualified responses; the council would need to first carry out a risk assessment or would require insurance cover to ensure it was indemnified. One of these

councils had, in fact, permitted horse riding to take place on its land subject to the group concerned obtaining such insurance.

Of the specific activities that were identified it was those which took place on or near water that were the greatest concern, being referred to by seven respondents (35%). These included not only activities such as sailing and fishing but also, for example, educational visits to Strangford Lough and camping or even simply walking in close proximity to a fast flowing river. Children were regarded as being particularly at risk.

Other activities that were identified as posing a specific risk were mountain biking/ scrambling and skateboarding, each of which were mentioned by two councils (10%) (with one of these being particularly concerned where scrambling took place on or near to footpaths), and rock climbing and community bonfires, each of which was cited by a single authority (5%).

Of the 13 councils (65%) that responded to the further question about how such concerns might be overcome, the overwhelming approach would be to try to anticipate and minimise the risks that might arise; an approach which was clearly rooted in, and reflective of, a broader health and safety culture within the authority and which (as three respondents acknowledged) may lead to the council to becoming over cautious or reluctant to support anything which the council believed it could not fully control.

In practice, this would entail carrying out a thorough risk assessment at the outset and thereafter ensuring a rigorous, on-going inspection and maintenance regime was established designed to ensure adequate maintenance was carried out and to anticipate and prevent any problems arising in the future. On occasions this approach may also require the provision of fencing to exclude the public from some areas, the erection of warning notices, or requiring the body requesting or promoting the activity to take out insurance cover so as to indemnify the council.

It is axiomatic in this approach, however, both that the type of provision which is to be made is capable of being 'assessed' in this way and also that it is possible with a reasonable degree of certainty to anticipate how the public can be expected to behave. This in turn

leads councils to think in terms of the provision of 'facilities', rather than more generic terms, and to set these up in a way which the council perceives will give it the necessary degree of control.

One council, for example, said that it was in the process of setting up some walking routes with private landowners. It had carried out a risk assessment and is to arrange a maintenance and inspection programme so as to be able to defend itself against any claims which may be made. Where the paths are over farm land, this may require that they be fenced (to protect users from farm animals) and provided with a hard surface. In another example, the council said that it was working through community groups to upgrade footpaths and also through the local Access Forum. This mechanism helped it to ensure both that the risks can be identified and properly assessed, and that if any problems arose in practice they would quickly be identified and brought to the council's attention for remedial action to be taken.

Effect on opportunities for informal outdoor recreation

While 15 of the respondents (75%) said they believed the consideration of risk had never prevented or affected the provision by their council of informal outdoor recreation opportunities, the related comments again suggest a degree of caution or at least uncertainty by a minority of authorities. As with previous questions, there was also a tendency to think in terms of the provision of facilities which could be assessed, but which would also need to be monitored and maintained if problems in the future were to be avoided. One council, for example, said that it would expect a risk assessment to be undertaken in relation to any new activity; another that it would similarly discuss any such requests with its insurers. A third council again reiterated that it was uneasy about any activities involving young people on or near water and would seek to ensure these are properly supervised; a fourth that it would endeavour to work through community groups to identify and contain the liability risks.

Two of the respondents specifically referred to the issue of responsibility for 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 personally 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. The second respondent, representing one of the five councils (25%) where the consideration of risk *had* affected provision of outdoor recreational opportunities, stated that his council was extremely loath to 'take on' footpaths and open spaces. This was because (in the council's view) if paths were signposted but not thereafter adequately maintained 'the council would then become liable and vulnerable to claims'. In neither case, however, did the individual officer or the council have any hard evidence on which to base this view; rather it was the perception of what might happen.

Of the other activities that councils had (or would) decline to support, three respondents specifically referred to the provision of facilities for skateboards (although for one of these an earlier decision had been reversed and the council was now building a skate board park). Another officer said his council had refused to take responsibility for a campsite next to a fast flowing river which the countryside officer had negotiated but where the council did not own the land and could not, therefore, exercise sufficient control.

Would guidance be helpful?

At the end of the questionnaire or interview 18 of the respondents² were 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?' Fourteen of these (70%) said that it would, with one (5%) being neutral. The related comments ranged from those officers who felt merely that 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'.

² The question was omitted from two of the earliest interviews.

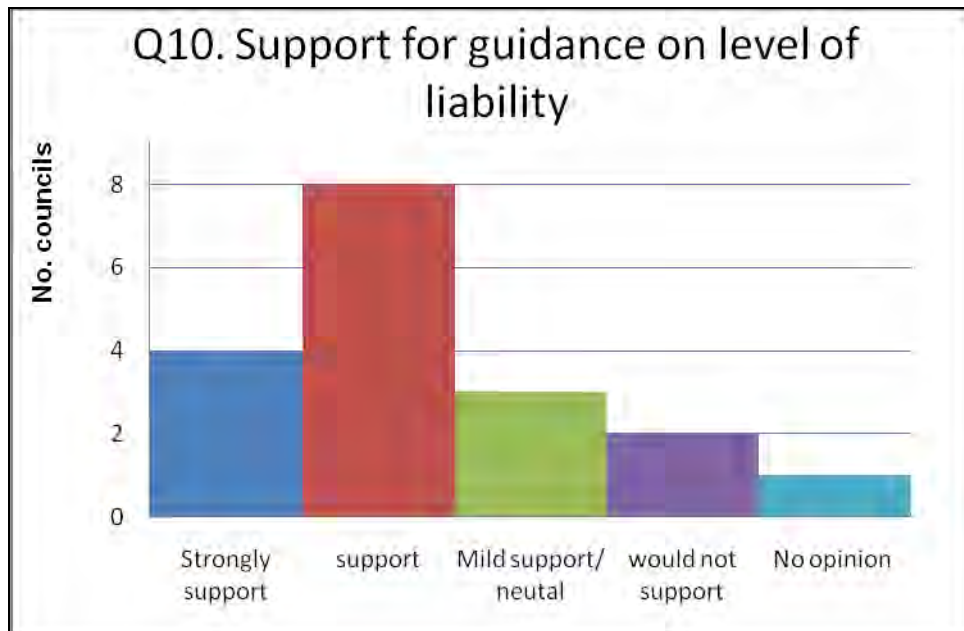


Figure 2: Support for guidance on level of liability

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. Similarly the one officer (5%) who was neutral on the publication of guidance on the level of liability claims (believing that those who worked in the field knew what the situation was already), nevertheless considered that there was a strong need to get a message out to the general public about what to expect when visiting to countryside and emphasising the need to take reasonable care for one's own safety.

Only two of the 18 respondents (10%) believed that guidance on the level of actual liability would not be helpful or was not necessary, with one of these commenting that the council's insurance broker already provided training on risk assessment. One respondent (5%) declined to express an opinion.

Roy Hickey

Public Rights of Way Services Ltd.

April 2011

Appendix 1: Interview questionnaire

The survey of district councils was primarily carried out by means of pre-arranged semi-structured telephone interviews based around an interview pro-forma. However the pro-forma was also converted to a questionnaire, which was sent to those officers who were unable to engage in an interview or who stated they would prefer to provide information in this form. The questionnaire is set out below.

Review of occupier's liability cases for SportNI

Introduction:

We would be grateful if you could provide the following information which is needed as part of a study for SportNI into the impacts of the current Occupiers' Liability legislation in Northern Ireland on the provision of opportunities for informal outdoor recreation.

By informal outdoor recreation we mean activities such as walking, cycling, jogging or horse riding for pleasure. We are not concerned with claims relating, for example, to outdoor sports, that arise from organised events or relating to the use of facilities such as children's play grounds.

Name:	
Position:	
District council:	

A. Responsibility for handling liability claims	
(i)	Could you first either confirm, please, that you would be primarily responsible for handling any liability claims that might be made against the Council relating to <u>informal outdoor recreation</u> or give the name and position of the officer concerned.
(i)	
(ii)	And which company is the Council currently insured with regarding its public liability?
(ii)	
B. Changes in insurance cover	

1.	<p>Over the past 10 years are you aware of any changes that have been made in either:</p> <ol style="list-style-type: none"> a. the <u>level</u> of insurance cover relating to informal outdoor recreation b. the <u>type</u> of insurance cover (e.g. specific activities covered) c. the <u>cost</u> of liability insurance <u>premiums</u> <p>If there have been any changes, please also explain what these were and give the reasons</p>
1.	<ol style="list-style-type: none"> a. b. c.
C. Awareness of liability claims	
2.	<p>Are you aware of:</p> <ol style="list-style-type: none"> a. any <u>actual</u> liability claims that have been made (either against the Council or anyone else) relating to informal outdoor recreation, or b. any such claims having been <u>threatened</u>?
2	<ol style="list-style-type: none"> a. b.
3	<p>For every incident noted at 2 a or 2 b above, please give brief details of:</p> <ol style="list-style-type: none"> a. The year of the incident. b. What was alleged to have happened to give rise to the claim or threatened claim? c. Who decided how the claim or threat should be dealt with (e.g. the council or insurance company)? d. What was the outcome and why was this course of action chosen? e. Did it have any subsequent effect on the council's policy or practices?
3.	<ol style="list-style-type: none"> a. b. c. d. e.
D. Perceptions of liability risk	

4.	What is your Council's perception of the liability risk associated with informal outdoor recreation in general? Is it high, medium or low?
4.	
5.	Why do you take that view? Do you have any evidence to back this up?
5.	
6.	Has your perception of this risk changed in recent years? If so, how and why?
6.	
7.	Are there any particular informal outdoor recreation activities that take place on Council owned land or which you might be asked to permit which you consider to be particularly risk prone? If so, what are they and why do you take that view?
7.	
8.	If the answers questions 4-8 above show the council has some concerns about the degree of liability risk, how might those concerns be overcome?
8.	
9.	Has the consideration of risk ever prevented or otherwise affected your council's provision of informal outdoor recreation opportunities? If so, please give details:
9.	
10.	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?
10.	
E. Other comments	
11.	Finally, do you have any other thoughts on the issue of occupier's liability in relation to informal countryside recreation or how this issue should be addressed?
11.	-

Thank you for your help in providing this information.

Please return the completed form as an e-mail attachment to rh@prowservices.co.uk

Roy Hickey

01242 522288

15th February 2011