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The Impacts of the **Current Occupiers Liability** **Legislation**

Summary Fact Sheet

sport Northern Ireland

Executive Summary

The study was carried out by "Outplan" and was commissioned by Sport Northern Ireland to examine the actual court cases and out of court settlements in relation to Occupiers Liability and informal Outdoor Recreation. Given the clear lack of court cases and very low level of out of court settlements, the consultants then examined the background and reasoning for the continuing perception among landowners and public land managers that to allow outdoor recreation to take place on their land carries with it a high degree of risk in terms of potential liability claims. This appears to be despite the consistent ruling of the courts that such users are responsible for their own safety as per the principle of "**Volenti non fit injuria**." This principle is a common law doctrine which means that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they cannot then sue if harm actually results.

The study focussed on the public's use of land for 'informal outdoor recreation', that is - non-motorized sporting and recreational activities that take place on a casual basis in the natural environment on land which is in a natural or semi-natural state including trails (e.g. without laid out playing fields, structures or a built facility).

The study was carried out in the context of the current review and updating of the existing 1998 Countryside Recreation Strategy for Northern Ireland. It involved gathering information from a wide range of landowners and managers through direct face-to-face and semi-structured telephone interviews and questionnaires. A comprehensive update of court cases was also undertaken as well as a separate sub-study to establish the perceptions of a range of individual recreational users on the liability issue.

The primary legal context

Courts throughout the UK, particularly the higher courts, have long taken a common sense, pragmatic view, that any person voluntarily engaging in an outdoor recreational activity should be responsible for his or her own safety. In the leading case of Tomlinson v Congleton Borough Council [2003], involving a young man who broke his neck by diving into a shallow lake, 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." Subsequent cases have applied this principle widely, including in one instance to injuries sustained during the paid use of a built facility (an artificial climbing wall).

The full study report is divided into 3 parts, and is available to download from www.sportni.net

PART 1:

The 'reality' of claims – how many relevant claims have there actually been?

Despite extensive research, no successful liability claims were identified by the study that related to an injury arising from the informal recreational use of the natural environment.

However, during the research, three key themes emerged which give an insight into how informal recreation in the natural environment is actually perceived and treated:

1. There is a widespread difficulty amongst land managers in particular in understanding what is meant by 'informal outdoor recreation'.

Respondents commonly thought only in terms of 'facility-based' recreation, with any examples of liability claims being invariably to do with built structures or areas, such as footpaths in parks, sports grounds and facilities where the duty of care to users would be expected to be higher.

2. There is a tendency to confuse the concept of Occupiers' Liability with the requirements of Health and Safety legislation.

The approach adopted to 'managing' liability risk is commonly rooted in Health and Safety legislation, with managers seeking first to identify the specific risks associated with a particular activity or area of land and to then to set up an appropriate monitoring and inspection regime.

3. There is a lack of understanding as to the actual legal position.

When the legal context was explained more fully, a realisation often set in that the informal recreational use of the natural environment was "not a problem".

Public Land in Northern Ireland

A study for CAAN found that 90% of the public land in Northern Ireland used for outdoor recreation is owned by the Forest Service. NIEA and the District Councils each hold 4%, NI Water holds 1%, with DARD, DCAL, Waterways Ireland and the Loughs Agency collectively owning less than 1%.

Public Land managed by Central Government Departments or their Agencies

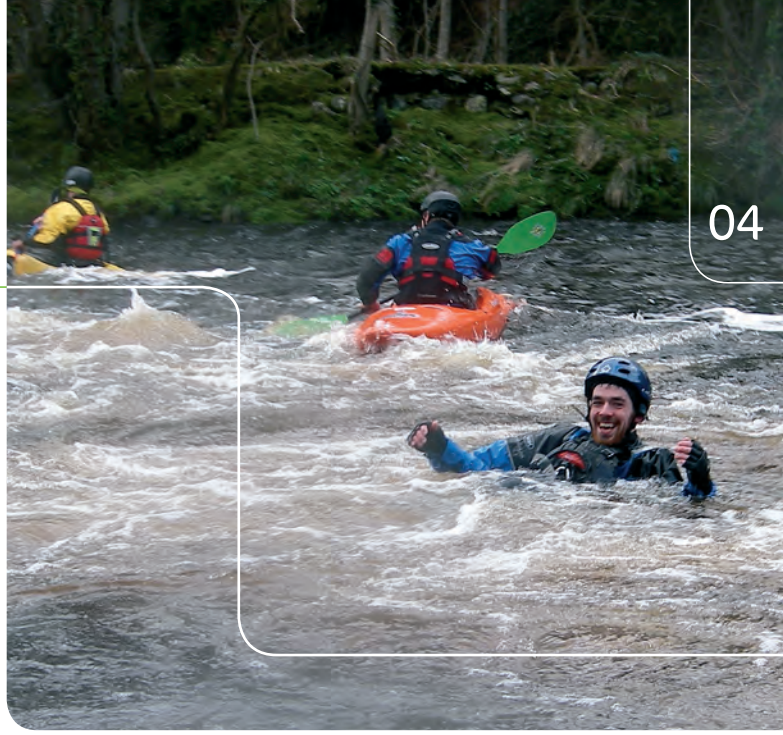
Forest service: The Service's potentially vital recreational role has recently been enhanced by the provisions of the Forestry Act (NI) 2010, but draft byelaws drawn up under the Act appear to be influenced heavily by Health and Safety concerns and do not seem to reflect the current Occupiers' Liability legislation and its interpretation by the courts.

Among other issues raised in discussion was the supposed lack of clarity arising from the Tomlinson judgement about what constituted a 'natural feature'. Claims have been settled by the Service relating to structures (e.g.) stone steps and a wooden walkway but further guidance on what the courts consider natural would be welcomed.

The intention of the courts, as illustrated in subsequent cases, appears to be one of self-responsibility and individual choice with respect to risk and that to climb over stone walls, for example, although not specifically mentioned in the Tomlinson case, would be covered by self-responsibility. This was clearly borne out in the attitude and feedback from actual recreational users.

Northern Ireland Environment Agency (NIEA) received six claims between 2008 and 2010 relating to injuries sustained by visitors to NIEA properties, two of which were pursued. None of the claims come within the study definition of 'informal outdoor recreation'.

Inland Waterways (DCAL) receives an average of two liability claims a year but these invariably relate to structures at specific facilities. Most are successfully defended and the issue of liability is not regarded as a problem.



District councils

A separate survey of **district councils** found that a quarter (25%) had never received any liability claims relating to informal outdoor recreational activities. The majority reported that they have around one or two claims each year related to incidents which took place on land set aside for recreation (e.g. urban parks) and involving some form of encounter with a man made feature or obstacle.

Three of the councils indicated that they were 'largely self insured', meaning they carried a high voluntary excess (e.g. of £50,000). They vigorously challenged every liability claim 'on principle' and could show that this approach had led to a significant reduction in the number of claims being made. This 'challenge' approach appears to have very significant merits.

In the other councils, the final decision on any liability claim rested with the council's insurers. The sums claimed were generally below £2,000 and in most cases, if the claim was not dropped, it had been settled out of court. A number of councils said they believed this was often on the grounds of financial expedience, as the 'cheapest' and most certain resolution (although this was strongly denied by the insurance companies themselves). There also appears to be a widely held belief that the NI courts and individual judges, tend to be biased in favour of a claimant, especially where the injured person is a minor or has suffered visual scarring and this underscored a 'settlement' mentality.

Overwhelmingly the councils did not perceive there to be a significant risk of liability associated with informal outdoor recreation. However, when asked about the matter of providing or facilitating further informal recreational opportunities, reflecting Theme 2 above, councils would want to routinely carry out a 'Health and Safety' risk assessment and set up an appropriate monitoring regime. Some would also require 'liability insurance' to be taken out (for example on walks developed by CAAN) to indemnify the council against any potential adverse claims, in summary a very cautious approach.

Accordingly, most councils said they would welcome guidance on the actual level of a landowner's liability and on the outcome of claims determined by the courts. Guidance to the public on what to expect when visiting the countryside and the need to be adequately prepared would also be considered valuable as this, they felt, would demonstrate to the courts the standard of care that visitors are expected to take to ensure their own safety.

Non-governmental organisations

The National Trust receives on average eight liability claims a year (from around 2 million visits) but it is not aware of any 'open country' claims. Similarly, only one such claim (currently disputed) has been received by **Northern Ireland Water** despite its extensive land holding in the Mournes and elsewhere. Nor have any claims been received by the **Ulster Wildlife Trust** or **Woodland Trust**.

For the **Ulster Farmer's Union** the issue of occupier's liability is one of a number of concerns relating to access to the countryside, including bio-security, dogs worrying livestock, litter and vandalism. They too would welcome greater clarity but felt no change was required to the existing legislation. Fundamentally, they felt that a fund or some other mechanism was needed that could indemnify individual farmers against rogue or wild-card claims. Overall, the UFU was adamant that any increase in access for informal recreation should be on land that is already in public ownership, and asked that this point be emphasised in this report.

The insurance industry

A separate telephone survey of leading **members of the insurance industry** in Northern Ireland confirmed that there are no records of any liability claims pertaining to this study having been made or threatened against a landowner by recreational users in the past 25 years. Nor are there any circumstances in which (in the view of the industry) a landowner would normally be liable to a recreational user for such use.

Contrary to the widespread view among district councils, industry representatives stated categorically that no claim, no matter how small, would be settled purely on the grounds of financial expedience.

PART 2:

‘Perception is nine tenths of reality’ – Changing realities

The study clearly indicates that the culture of risk assessment, risk management and ‘caution’ are deeply engrained in the procedures and attitudes of public and quasi-public landowners. But while many land managers struggle with the concept of activities happening outside their ‘control’ or ‘without permission’, there is no legal basis either to attempt, or to expect, such control. The courts having consistently held that it is for the individual user to accept responsibility for his or her own actions.

The study also found no evidence of a ‘claims culture’ with regard to outdoor recreation, while a separate questionnaire survey of 360 recreational users shows that they too believe the user is responsible for his or her own safety, a response which matches the legal reality. **Nevertheless, it is clear from the information detailed in Part 1 of the study that landowners still feel vulnerable with respect to those using their land for recreation.**

To date, the provision of liability insurance to address these concerns has enabled some new walking routes to be agreed over private land. The study concludes that a similar degree of reassurance will be fundamental to the ability to secure further opportunities for outdoor recreation on private land. 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, also appears to be both valid and feasible and, given the courts stance, the study recommends that this should not entail indemnity insurance on public land as this is arguably an unjustified use of public money.

PART 3:

A reality check – Recommendations on the suggested way forward

To help address the dearth of informal outdoor recreation opportunities compared to other regions of the UK, it is proposed that action should be explored at a number of levels.

A key recommendation is that an Assembly Policy Statement be sought on the positive use of all public land for outdoor recreation and on a right of access to such lands.

Actions should also include:

- Further development of the cross-sector approach already started by Sport NI in taking the lead on addressing policy issues and progressing the new Outdoor Recreation Strategic Action Plan;
- Empirical research to quantify the benefits of Outdoor Recreation to the Northern Ireland society, including health, wellbeing and the economy ;
- The production of clear guidance, in conjunction with the Departmental Solicitor's Office, to help address operational land managers' concerns and determine whether, and at what level, specific risk assessments are necessary;
- Guidance to help promote responsible access and to educate the public about their rights and responsibilities;
- The development of a specialist legal advice service, in partnership with the farming unions, to address and help allay landowners' concerns over the potential for 'rogue' liability claims.

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