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Assembly

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Access and Liability Briefing

The following paper is the briefing given to the Environment Committee on Access and Liability legislation in Northern Ireland, and should be read in conjunction with the Research Paper '*Access to the countryside in Northern Ireland – occupiers' liability*' (NIAR 706-12).

1 Introduction

Northern Ireland has very few public rights of way and in many areas access is obtained by permission from landowners. Much of Northern Ireland's public land is also accessible, for example Water Service and Forest Service land, as is land owned and managed by organisations such as the National Trust and the Woodland Trust. The Access to the Countryside Order 1983 gives district councils the power to enter into public path creation agreements with landowners, creating public rights along specified routes, and access agreements giving access to open country for open-air recreation.

Country	Total Size in SQM	Miles of PROW	Length of PROW per SQM
England	50,000	118,000	2.36
Wales	8,000	20,625	2.58
Northern Ireland	5,500	123	0.02

Table 1 - A comparative analysis of public rights of way^{1,2}

By way of a brief comparison, this does not provide the same level of access as legislation in other parts of the UK: Scotland has the “Freedom to roam” and “right to responsible access” under the Land Reform Act 2003. England and Wales have the Countryside Rights of Way Act 2000 and more recently the Marine Coastal Access Act which opens up a coastal route round England and Wales, all of which give greater levels of public access to most land.

However in 1999 the DOE undertook an access consultation which included the question of whether a right to roam policy should be established in Northern Ireland. There was strong opposition to this proposal, due to widespread concern amongst landowners that with increased access comes increased liability, and for this reason the DOE discounted the proposal.³

The Issues

Misperception

What appears to be most evident is that while legislation does exist in terms of access provision, liability, and duty of care⁴, there is an on-going perception amongst landowners that the legislation is very much in favour of the public, leaving them more vulnerable in terms of liability. However, the number of successful claims made against landowners in NI would suggest that the legislation does in fact provide effective safeguards:

In June 2011, Sport NI produced a study ‘*The Impacts of the current Occupiers’ Liability legislation in Northern Ireland on outdoor recreation*⁵. This study conducted questionnaires and surveys to the general public, councils, representatives of landowners, such as the UFU and the insurance industry in NI, on the issues of perception surrounding liability. The study found that the perception of risk appeared to be over stated compared to the actual numbers of successful and unsuccessful cases

¹ Sport NI, *Bridging the Gap*, May 2009

² Ibid. The availability of PROW in Scotland is more complex and cannot be easily compared

³ DOE and DFP, *Occupiers’ Liability Law in the Context of Access to the Countryside in Northern Ireland* (No date). Available at: http://www.doeni.gov.uk/niea/occupier_liability.pdf

⁴ For more detail see p2/3 of Research Paper ‘Access to the countryside in Northern Ireland – occupiers’ liability’ (NIAR 706 - 12).

⁵ Sport NI, *The Impact of the Current Occupiers’ Liability Legislation*, June 2011. Available at: <http://www.sportni.net/about/PolicyAndResearch/Recent+Research>

against a landowner, occupier or manager with respect to recreational users of land over the *last 20 years*.

For example:

- No successful liability claims were identified by the study that related to an injury arising from the informal recreational use of the natural environment⁶.
- A telephone survey of leading members of the insurance industry in Northern Ireland confirmed that there are no records of any liability claims having been made or threatened against a landowner by recreational users in the past 25 years.

It is important to note that organisations such as the Forest Service, NIEA and district councils have made reference to a number of claims, however these were made in relation to structures and purpose built sites including tourist sites, all of which are classed as ‘facility based’ and therefore have a greater duty of care and increased liability towards landowners compared those offering access for informal outdoor recreation.

Subsequently the Forest Service has indicated a lack of clarity around what constitutes a ‘natural feature or structure’ and a ‘man-made structure’. Clarity is important as landowners may confuse the higher level of liability and risk associated with purpose built features/sites with the natural environment, which is much more based on the principle that those using the countryside should be primarily responsible for their own safety.⁷

This view is supported by a case in 2003 known as Tomlinson versus Congleton Borough Council (referred to on p.3 of Sport NI study) where the court found in favour of Congleton Borough Council with respect to a man who had dived into open water and broken his neck. The judge at the time, 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”

In relation to mis- perception, the Sport NI study turned to the issue raised by the UFU regarding the ‘claim culture’ that farmers believe exists throughout NI. As discussed previously, feedback from the insurance industry suggests that the ‘claims culture’ perceived by farmers is not as prevalent as they would suggest. This is further evidenced by responses from a ‘perception questionnaire’ issued to recreational users across NI as part of the Sport NI study. All 360 interviewed felt that the management of

⁶ For the 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. Informal recreational use of land in terms of outdoor recreation is the land that is being used on a casual basis for recreational activity or the land is in a natural or semi-natural state. This includes old tracks or paths.

⁷ More detail on p5 and p7 of Research Paper ‘Access to the countryside in Northern Ireland – occupiers’ liability’ (NIAR 706 - 12).

any risk associated with both their activity and the ‘hazards’ of the natural environment fell to them.

However, this does raise the question that if proof exists that the fear of risk is based on misconception by landowners, then why does it still persist?

The UFU highlighted a case in England when a woman using a PROW through a farmer’s field was injured by the farmer’s cattle, and it was reported she claimed around £1million in injuries. The judge found that on the facts of the case presented before him, the farmer did in fact have a liability to the woman in respect of the injuries she received. The UFU felt this clearly illustrated the ‘hazards’ of allowing people to enter onto private farmland and the potential threat that this posed to farmer’s livelihoods.⁸

Another consideration is that Councils are under no requirement to report claims to the Department under the Occupier’s Liability Order. However if information was reported and made accessible to the public, it may help to put fears at rest. For instance, when councils were asked if 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 recently been considered by the courts would be useful, 70% agreed.⁹

The 2006 guidance document from the Department “Guide to Public Rights of way and Access to the Countryside” which is primarily aimed at councils, can also be accessed by the general public. There is an indication within the document that councils are not afforded much of a safeguard when it comes to giving advice on liability. Not only could this discourage councils from offering advice, but it could add to the lack of confidence that landowners have around the whole system. For example the guidance document states:

“The district council may need to be particularly careful; one legal commentator has suggested that a local authority may be liable for making a negligent misrepresentation upon which a person reasonably relies to his detriment”¹⁰

(However, whether it affects insurance or not, costs would still be incurred in reaching a decision on ‘unsuccessful’ claims)

Confusion

Adding to the issue of mis-conception is the apparent amount of confusion surrounding existing legislation. According to the Sport NI study:

- There was widespread difficulty amongst land managers, in particular, in understanding what is meant by ‘informal outdoor recreation’ – respondents

⁸ See p. 23 Sport NI Study

⁹ See p. 17 Sport NI Study

¹⁰ Environment and Heritage Service, *A Guide to Public Rights of Way and Access to the Countryside*, 2006

commonly thought only in terms of 'facility-based' recreation where the level of risk and liability is higher.

- Tendency to confuse the concept of Occupiers' Liability with the requirements of Health and Safety legislation.
- Lack of understanding as to the actual legal position.
- Confusion surrounding the level of duty a landowner owes to a non-visitor compared to a visitor and what distinguishes them from each other. For example under the Occupiers Liability Order 1987, a visitor (which is given a much higher level duty of care compared to a non-visitor) may in fact include people using a path which has been subject to a permissible path agreement, and is therefore not solely defined as someone who has been officially invited onto the land, and whose presence is known by the owner.

Occupiers' liability is amongst a number of concerns in relation to access raised by the UFU, which also includes bio-security, dogs not under control, litter and vandalism, disturbance to farming practices, and potential rise in insurance premiums. They feel a change in the current Occupier's Liability legislation is not needed; however more clarity should be provided on it to shed light on some of the mentioned grey areas. They also feel that farmers need to be protected through a fund against rogue claims.¹¹

The 236 page guidance document, also known as the 'Red Book' is based on access in relation to council processes to achieve it, the different types of access and the management of them.¹² While it does cover the issue of liability, the Department, along with DFP produced a more manageable information leaflet titled "Occupiers Liability Law in the Context of Access to the Countryside in NI". However in the Sport NI study, the UFU have criticised existing guidance for not providing the clarity that is needed in relation to liability amongst the agricultural community.

Through a study commissioned by the Environment Committee to the 26 councils, respondents suggested that to encourage more landowner participation in access provision there should be funding and a form of legal advice service to protect farmers against 'rogue' claims, plus incentives such as agri-environmental schemes to assist creation and maintenance. Councils also highlighted their difficulty in obtaining documentary evidence on PROWs as Ordnance Survey maps and Land Commission maps do not show them, unlike England who uses maps drawn since the time of the Enclosure Act recording the PROW network.

As discussed in the table at the beginning of the paper, NI has a very limited PROW network in comparison to the rest of the UK, and it is the only part of the UK which has no wider rights of access covering areas of private and public land. According to Sport NI, there appears to be no legal reason why such rights should not extend and cover all public land. However, this change needs to be weighed against the net benefits in

¹¹ P.23 of Sport NI Study

¹² Environment and Heritage Service, *A Guide to Public Rights of Way and Access to the Countryside*, 2006

terms of health; wellbeing and economics to NI, versus the management of operational requirements and health and safety concerns associated with such a change, and therefore requires further investigation.

Finally, DCAL was asked to provide an update on the recommendations made in the Sport NI Study to get an indication of any progress. In the response, Sport NI informed that:

- While there was a recommendation for an Assembly policy statement, there should in fact be legislation for:

“a public right of access to all suitable public land for sustainable and responsible Sport and Physical Recreation”

Sport NI suggested that the best way to achieve this would be through RPA legislation or any development of National Parks legislation.

- With respect to the need for a cross sector approach, the new draft Outdoor Recreation Action Plan, developed by Sport NI and NIEA, highlights the importance of communication of issues around occupiers' liability, access to public land and the development of access agreements. The draft is currently out for consultation until January 2013, and it will be interesting to see how this is addressed and taken forward.
- Sport NI articulated the need for clear guidance in conjunction with the Departmental Solicitor's Office, to help address land managers' concerns and to determine the need for risk assessment, however their update informed that Sport NI is not aware of any progress in this regard.

However, since the study, Sport NI is aware that NIEA, Outdoor Recreation NI, the Health and Safety Executive, the National Trust and the UFU have worked in partnership to develop publications on personal responsibility and responsible dog management in the outdoors. These are to be distributed through outdoor retailers, education centres, tourist information centres and local authorities etc. in the hope that this will help promote responsible access and educate the public about their rights and responsibilities.

- It was suggested that there is a need for a specialist legal advice service in partnership with farming unions to help address and allay landowners' concerns over the potential for 'rogue' liability claims; however to Sport NI's knowledge there has been no development of this to date.

In Conclusion

If the aim is to increase access to the countryside, whether it be achieved by introducing legislation similar to that in Scotland and England and Wales, or by maintaining the status quo through existing legislation, approval and agreement is still needed from landowners and managers. To achieve this, embedded fears need to be

put to rest and replaced by the assurance that increased access does not in fact leave landowners more susceptible to liability. However, the fact that minimal figures of claims against owners of land, and consistent rulings from courts stating “*that it is for the individual user to accept responsibility for his or her own actions*” has not had much of an impact to date, highlights the difficulty in the task required.

However, whether this can be achieved by:

- **Introducing an indemnity-** through changing and tightening existing occupiers’ liability and or access legislation(e.g. Occupiers Liability Order 1987 or Access to the Countryside Order 1983) to indemnify farmers and landowners from any claims for damage from recreational walkers, as has been done in England.

The Countryside and Rights of Way 2000 legislation in England and Wales provides many additional designated “off road” recreational walking areas to add to a comprehensive network of Rights of Way. The “CROW” Act indemnifies landowners against claims for damage from recreational walkers:

(6A)....an occupier of the land owes (subject to subsection (6C) below) no duty by virtue of this section to any person in respect of— .

(a)a risk resulting from the existence of any natural feature of the landscape, or any river, stream, ditch or pond whether or not a natural feature, or .

(b)a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile. .

(6B)For the purposes of subsection (6A) above, any plant, shrub or tree, of whatever origin, is to be regarded as a natural feature of the landscape. .

(6C)Subsection (6A) does not prevent an occupier from owing a duty by virtue of this section in respect of any risk where the danger concerned is due to anything done by the occupier— .

(a)with the intention of creating that risk, or .

(b)being reckless as to whether that risk is created.”¹³

- **Improved guidance** – by purely providing better, more manageable and transparent guidance and information aimed specifically at landowners and recreational users; and
- **Providing more financial assistance and legal advice to landowners.**

¹³ See section 13 CROW Act 2000 <http://www.legislation.gov.uk/ukpga/2000/37/contents>

Appendix 1: Further notes of information

Liability insurance:

Sport NI study conducted a questionnaire to all Councils asking about their liability insurance cover and premiums- found that there has been no change in the level, type or cost in relation to informal outdoor recreation.

However it discovered that 3 councils have become largely 'self-insured' by accepting a greater excess (of £50,000) to settle claims below this limit – this has resulted in long term decrease in number of liability claims made (for all activities) as word has spread to solicitors and -significant reduction in insurance premiums.

However, whether it affects insurance or not, costs would still be incurred in reaching a decision on 'unsuccessful' claims.

Insurance of walks:

NIEA pay for insurance of walks under the 'quality walks' branding, such as waymarked ways and the Ulster Way. However, it is reluctant to provide insurance for all 'quality walks' due to the concern that every route not a right of way would eventually have to be covered at the insistence of landowners – and whether then District Councils should pay for such insurance.¹⁴

Right to Roam – England Wales and Scotland

Scotland –

The Land Reform Scotland Act (2003) establishes a right of non- motorised access over most land and inland water.

Local Access Forums have been set up in all local authority areas and national parks. They are helping to promote the new access arrangements and encourage the development of new path networks.

England and Wales –

Under the CROW 2000 Act, especially since 2005 people across England and Wales have the freedom to access land, without having to stay on designated paths. 1/5 of Wales is classed as 'access land'. ROI does have PROWs, but no legal right of open access to land – access must be negotiated through access agreements with private landowners who have the right to remove it without notice at any time.¹⁵

¹⁴ p.10 Sport NI Study

¹⁵ Mountaineering Ireland <http://www.mountaineering.ie/accessandconservation/viewdetails.asp?ID=12>