

A Brief Guide to Occupiers' Legal Liabilities in Scotland

in relation to Public Outdoor Access

Natural Heritage Management



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INTRODUCTION

This booklet aims to provide a brief introductory outline on occupiers' liability in law in Scotland, in relation to public outdoor access. It is based upon studies carried out for Scottish Natural Heritage by the University of Aberdeen School of Legal Studies. The first of these studies was in 1996, and a recent second study considered further legal judgements in relevant cases up to 2004.

For this booklet, SNH has re-formatted the information from those studies to highlight relevant material for land managers. Part One of this leaflet provides a brief introduction to the main statutory provisions. Part Two then looks at various case decisions, which have interpreted and applied the law to actual case circumstances.

Please note that this is not a definitive interpretation of the law, and cases are decided upon the individual circumstances of each case.

Published in April 2005

PART ONE: STATUTE LAW

NOTE – This is not a definitive statement of the law – take legal advice as necessary.

1. OCCUPIERS LIABILITY (SCOTLAND) ACT 1960

An 'occupier' of land has a duty to show care towards people on that land. The level of this duty of care is the level which it is reasonable to foresee will be needed so that people do not suffer injury or damage. The occupier must consider injury or damage which may be caused as result of any dangers due to the condition of the property, or of anything done or omitted to be done by the occupier which is his legal responsibility.

The Occupiers Liability (Scotland) Act 1960 states:
"The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or anything done or omitted to be done on them and for which the occupier is in law responsible shall.....be such care as in all the circumstances of the case is reasonable to see that the person will not suffer injury or damage by reason of any such danger."
(Section 2.1)

Occupier – The occupier is defined as the person (or body) "occupying or having control of land or other premises". Where premises are leased, then the respective duties of the landlord and tenant will depend upon the terms of the lease. Where a landlord is responsible for the maintenance or repair of the premises, he has to show the same duty of care to persons on the premises as an occupier would. Different people exercising different degrees of control could owe a duty of care at the same time.

Reasonable care – The duty of care to be shown to a person on 'the premises' is to take reasonable care to see that the person does not suffer injury. What is reasonable will depend on the circumstances of each case, and is generally regarded as what a reasonable person would consider to be reasonable. Generally, the occupier will owe a duty of care if he/she reasonably could have foreseen that harm would be caused to a person on the property because of the occupier's act or omission. The case by case decisions contained in Part Two below help to define and illustrate this level of care and responsibility and foreseeability.

Nature of danger – The hazard must be one which is due to the state of the premises (which might include natural dangers as well as man-made ones) or to anything done or omitted from being done on the premises for which the occupier is legally responsible. This generally involves the principle of the occupier having been negligent over his/her responsibilities. An occupier is not normally expected to guard against dangers which are obvious – see the case decisions in Part Two.

Persons entering onto the premises – The occupier owes a duty of care to all persons entering onto his/her premises. This is irrespective of whether they have permission to be there or not, so in Scotland since 1960 no statutory distinction has been drawn between classes of visitors to the premises (unlike in England where the statutory duty of care owed to invited visitors is greater than the level of care owed to trespassers).

Willingly-accepted risks – The 1960 Act explicitly excludes any obligation of occupier liability over risks willingly accepted by the visitor. Section 2.3, states – *"Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes another a duty to show care."* This applies to the risks inherent in any pursuits undertaken by visitors on the land, and may for instance include mishaps inherent in quite ordinary activities like walking, swimming etc. This provision also relates to the general legal principle known as 'volenti non fit injuria', which means that if a person knowingly participates in a risky activity, for example rock climbing, they will be taken to have accepted the risk of injury if they have an accident.

Characteristics of the visitor – The 1960 Act does not specifically refer to the duties owed to children. However, it should be borne in mind that certain dangers will be less obvious to children than to adults, and if it may be anticipated that children are going to be present on the land, then it will be reasonable to expect that to be taken into account in the level of care shown. The principal duty in relation to very young children remains with their parents.

2. HEALTH AND SAFETY AT WORK ACT 1974

The Health and Safety at Work Act 1974 places duties on employers and the self employed to persons other than employees. Employers must conduct their undertakings in such a way as to ensure, so far as is practicable, that persons not in their employment who may be affected are not exposed to risks to their health and safety (Section 3(1)). A similar duty also applies to the self employed (Section 3(2)).

This Section 3 duty has four parts –

- a) The duty is owed by employers or self employed people. This will include farmers, owners of sporting estates and land managers. It would also include tenant farmers, those who lease sporting estates and fishings, and those organising events in the countryside as their employment (eg. walking guides, climbing instructors, organisers of paintball games).
- b) The duty is owed to 'persons other than employees'. This includes all members of the public and people taking access to the countryside.
- c) The standard is one of reasonable practicability.
- d) The duty arises out of the conduct of the undertaking.

The basic requirement under Section 3(1) is for the employer to ensure, subject to reasonable practicability, that he/she does not create risks to any person's health and safety in the way the undertaking is run. Examples may include the spraying of fields and crops with pesticides, and the conduct of a shoot. Section 3(1) also requires information and instruction on how to avoid risks to health and safety, subject only to the requirement of reasonable practicability. A prosecution under s 3(1) is competent so long as there is a risk of exposure to danger – it is not necessary to prove that the risk actually materialised. Thus, Sections 3(1) and 3(2) of the 1974 Act impose a core duty under the Health and Safety legislation on land managers and other owners and users of land for the protection of members of the public taking access in the outdoors.

Any person who may owe duties under s 3 of the 1974 Act must also take into account the **Management of Health and Safety at Work Regulations 1999** (the 1999 Regulations). These regulations provide more specific direction on how to carry out the duties under the 1974 Act. In doing this they also introduce the principle of **risk assessment**. Regulation 3(1)(b) requires every employer to make a suitable and sufficient assessment of "the risks to the health and

safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking." Regulation 3(2)(b) sets out the same requirement for self employed people. Employers and the self employed are also required to keep their risk assessments under review and to make any necessary changes (Reg. 3(3)). Employers who employ five or more employees must record the significant findings of the assessment and any group of employees who are especially at risk (reg. 3(6)). The failure by such an employer to carry out a suitable and sufficient risk assessment is a criminal offence.

The purpose of risk assessment is set out in the Approved Code of Practice which has been produced by the Health and Safety Executive (HSE) as follows: "The purpose of the risk assessment is to help the employer or self employed person to determine what measures should be taken to comply with the employer's or self employed person's duties under the 'relevant statutory duties'. This phrase covers the general duties in the 1974 Act and the more specific duties in the various Acts and Regulations associated with it. In essence the risk assessment guides the judgement of the employer or the self employed person as to the measures they ought to take to fulfil their statutory obligations" (paras. 7 and 8 HSE Code of Practice).

The 1999 Regulations also place a number of additional duties on employers which complement and enhance the basic requirement of risk assessment. Employers must make and give effect to appropriate health and safety arrangements, for the effective planning, organisation, control, monitoring and review of preventative and protective measures (reg. 5(1)).

The test of whether land managers' actions are "reasonably practicable" may be judged to some extent by any Codes of Practice relevant to their operations, as for instance published by organisations like HSE, or the Forest Commission for forestry works, etc. There appears to be only one piece of legislation which imposes a specific requirement on land managers to keep members of the public away from land for specific health reasons. This is the Control of Pesticides Regulations 1986 (as amended) which requires that the public must be kept out of fields being sprayed with sulphuric acid for 3 days following spraying.

3. ANIMALS (SCOTLAND) ACT 1987

The Animals (Scotland) Act 1987 Act established provisions to clarify the strict liability for injury or damage caused by animals – that is liability even without deliberate or negligent conduct. It states that a person will be liable for any injury or damage caused by an animal if three facts all apply –

- a) the person was the keeper of the animal at the time
- b) the animal belongs to a species known as being likely
 - (i) to severely injure or kill people or other animals,
- or
 - (ii) to materially damage property; and
- c) the injury or damage is directly related to those physical attributes or habits.

The animals species 'known to be likely to injure or kill' (item b(i) above) comprise dogs, and certain dangerous wild animals, which may injure by biting, or otherwise savaging, attacking or harrying.

The animal species 'known as likely to cause damage' by foraging (item b(ii) above) comprise cattle, horses, asses, mules, sheep, pigs, goats and deer.

An important exception is that liability under this 1987 Act does not apply where injury or damage is caused by the mere fact that the animal is present on a road or elsewhere (eg an animal straying onto a road and so causing a traffic accident). The keeper is also not liable under this Act if the injury or damage was wholly due to the fault of the person who was injured; or if the animal was reasonably and legitimately a guard dog.

4. UNFAIR CONTRACT TERMS ACT 1977

Part II of the Unfair Contracts Terms Act 1977 relates to Scotland, and legislates on whether an occupier may attempt to disclaim or restrict liability for breach of the duty of care by, for instance, displaying notices disclaiming responsibility at principal access points. This 1977 Act states that any such disclaimers are void if they try to exclude or restrict liability for death or personal injury. A disclaimer notice may be valid for loss or damage other than for death or personal injury, but it would have to be fair and reasonable. The question of fairness and reasonableness will depend on the circumstances in each case, and the person relying on the disclaimer would have to persuade the court that, having regard to all the circumstances, it was fair and reasonable.

5. LAND REFORM (SCOTLAND) ACT 2003

The Land Reform (Scotland) Act 2003, Part One, establishes statutory access rights to land in Scotland. This Act states that –

"The extent of the duty of care owed by an occupier of land to another person on the land is not ...affected by this Part of this Act or by its operation." (section 5.2). (The only exception to this is where a Path Order has been made, which would then involve the local authority).

In part, this clarification that the duty of care is neither increased nor diminished by the access rights reflects the existing legal position under the 1960 Act, since when in Scotland an occupier's statutory duty of care has applied with no distinction over the types of persons present on the premises, as mentioned above. The Scottish Outdoor Access Code accompanies the 2003 Act, to provide formal guidance on responsibilities associated with the access rights. One of the three central principles of the Scottish Outdoor Access Code is to 'Take responsibility for your own actions', and the Code provides substantial information about what this will mean in practice. The provisions of the Scottish Outdoor Access Code will be a material consideration when assessing issues of care and liability relating to the exercise of access rights.

PART TWO: INDICATORS FROM CASE LAW

NOTE – the outcomes of any case depend on the circumstances of that particular case.

(Firm statements of broadly-accepted principles have been highlighted in bold).

Section 1 – Fencing of hazards

1.1 Case Issue – **Duty to fence off permanent, ordinary features, natural or artificial**

Case title and date – Graham v East of Scotland Water, 2002

Case outline – A person drowned in a reservoir at night, and the case argued that the reservoir should have been fenced at a point where the wall bounding the reservoir was low. The court considered the case against the background of facts that the road alongside the reservoir was heavily used during the day and was also used at night but no-one else had sustained any accident nor had complaints about safety been made, and that the deceased lived locally and must therefore have been familiar with the topography of the site.

Case judgement – The court held that the danger in this case fell within the scope of earlier authorities concerning obvious dangers on land, against which no duty to fence is in law incumbent on an occupier. The court noted that the reservoir and the wall along its edge were man-made and thus artificial, but took the view that what really mattered was that they were well-established, permanent and familiar features of the landscape. The court said it was “unable to accept – at least without a history of accidents or complaints – that the danger alleged can properly be classified as unusual, unseen, unfamiliar or otherwise so special as to warrant the imposition on the defenders of a duty to erect fencing for the protection of the public at large.”

The court said that while the concept of ‘obviousness’ was not per se a satisfactory test in this area of the law, **obviousness was generally used to denote features of the environment which are permanent, ordinary and familiar, and that included both natural features and long-standing artificial features which are neither concealed nor unusual.**

The court held it was well-settled that an occupier must fence off dangers involving exposure to any special or unfamiliar hazard (for example industrial machinery or poisonous plants), but that **it would be going too far to suggest that a duty for safety fencing applied to permanent, ordinary and familiar features of the landscape** such as that involved in this case, so the case was dismissed.

1.2 Case Issue – **Duty to fence an obvious and natural hazard**

Case title and date – Duff v East Dumbartonshire Council and others, 1999, and appeal to House of Lords, 2002

Case outline – A person was injured when he slipped and fell down an embankment, and the case was brought that the slope should have been effectively fenced off from the nearby car park.

Case judgement – The case hinged around the distinction between what is obvious and what is concealed as a matter of fact. The court took the view that the exit from the car park itself could not be said to be dangerous, because of the area of level ground beyond it before the ground started to slope, and the sudden sharp slope of the embankment itself was an obvious and natural hazard against which the pursuer would have been expected to protect himself, and therefore dismissed the case. On appeal the Lords agreed with the principles applied by the lower court.

1.3 Case Issue – **Duty to fence along a cliff path, and to maintain fence**

Case title and date – Strachan v Highland Council, 1999

Case outline – A person was injured when he fell from a cliff top path, in the early hours of the morning, having gained access to the path from a car park by stepping over a fence which was found to be damaged at the time.

Case judgement – The court (following the decision in the case above), held that there was no duty on the defenders to erect a fence since the cliff was a natural and obvious hazard against which the defenders were entitled to assume people would protect themselves. The court noted that even in a dilapidated state, the fence remained a visible barrier the pursuer was aware of crossing. The court took the view that the real basis of the pursuer's case was that the defenders had failed to maintain the fence and, while the occupier would have had a duty to take reasonable care in any such maintenance, there was no evidence that the occupier knew or ought to have known of the damage to the fence. The court also took the view that **even if the occupiers had been at fault in failing to maintain the fence, in circumstances where a normal adult deliberately chose to cross an obvious barrier and proceed to a place of obvious danger, his misfortune was solely attributable to his own fault.**

Section 2 – Signs and notices on hazards / obvious hazards

2.1 Case Issue – **Duty to provide notices warning of danger (swimming)**

Case title and date – Darby v National Trust, 2001

Case outline – A man drowned while swimming in a pond, and the case was based on the argument that there should have been 'No Swimming' notices erected around the pond.

Case judgement – The court took the view that there was no duty to erect such notices. The case judgement stated that *"the risks to competent swimmers of swimming in this pond...were perfectly obvious. There was no relevantly causative special risk of which the National Trust would or should have been aware which was not obvious. One or more notices saying "Danger No Swimming" would have told [the deceased] no more than he already knew..."* **"It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coastline would be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs.** In my judgement there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased. That, in my view, applies as much to the risk that a swimmer might get into difficulties from the temperature as to the risk that he might get into difficulties from mud or sludge on the bottom of the pond."

2.2 Case Issue – Duty to warn visitors of obvious dangers

Case title and date – Tomlinson v Congleton Borough Council – House of Lords, 2003

Case outline – The pursuer sustained injury after diving into a pond in a country park.

Case judgement – The majority of the judges took the view that the claim failed at the outset because it could not be said that there was a danger due to the state of the premises or anything done or omitted to be done on them. In relation to the 'state of the premises' in particular, the judgement said:

*"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 the 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.** The 'state of the premises' is the physical features of the premises as they exist at the relevant time. It can include footpaths covered in ice and open mine shafts. It will not normally include parts of the landscape, say, steep slopes or difficult terrain in mountainous areas or cliffs close to cliff paths. There will certainly be dangers requiring care and experience from the visitor but it would normally be a misuse of language to describe such features as 'the state of the premises'. The same could be said about trees and, at any rate, natural lakes and rivers."*

Lord Hutton took the view that dark and murky water preventing a person seeing the bottom of the lake where he is diving could be viewed as *"the state of the premises"*. In any event, all of the judges went on to consider the position assuming that there had been a danger due to the state of the premises or anything done or omitted to be done on them, and held unanimously that there was no duty on the defendants to take any steps to prevent the pursuer from diving or to warn him against dangers which were perfectly obvious. Lord Hutton, having considered a number of the earlier authorities including Scottish authorities, said that:

*"they 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**".*

He added that there might be 'exceptional' cases where this principle should not apply and a claimant might be able to establish that the risk arising from some natural feature on the land was such that the occupier might reasonably be expected to offer him some protection against it – for example, where there was a very narrow and slippery path with a camber beside the edge of a cliff from which a number of persons had fallen. The emphasis is on such cases being exceptional, however.

Because this is a ruling of the House of Lords, the judgement in this case carries particular weight in relation to other similar circumstances.

Section 3 – Inspections / Appropriate systems / Occupier's knowledge

3.1 Case Issue – Regular safety inspections

Case title and date – Redfern v British Waterways Board, 1999

Case outline – Injury from faulty planking arose when the pursuer put his foot through the platform of a wooden jetty adjacent to a canal. The pursuer argued that the defective condition of the jetty would have been obvious on inspection for at least 12 months and that any reasonable system of inspection by the defenders would have allowed for inspection at intervals not exceeding 12 months.

Case judgement – The pursuer did not provide any justification for the time periods in this argument, and the court therefore held that it was irrelevant, noting that any duties of inspection incumbent on the defenders had to be related to the design characteristics and materials used in the construction of the jetty. In other words, there had to be a factual basis for stating that inspections should have been carried out at particular intervals.

3.2 Case Issue – Reasonable frequency of inspections

Case title and date – Gibson v Strathclyde Regional Council, 1993

Case Outline – The pursuer was injured when she stepped into an uncovered drain inspection hole in a pavement in central Glasgow. The case argued that it was reasonably practicable to inspect the drains daily.

Case judgement – The judgement in this case indicated **the factors which would make a relevant case in assessing reasonable inspection practice. These would be common practice (in this case by other local authorities); special circumstances existing at the site; and previous complaints.** The judgement also observed that it is not enough to assert that a daily inspection frequency is possible; it has to be more specific, in terms of practice and of particular circumstances, to succeed in showing that a daily inspection was both reasonable and practicable.

3.3 Case Issue – A system for dealing with dangers

Case title and date – McCondichie v Mains Medical Centre, 2003

Case outline – The pursuer sustained injury when she slipped and fell on an icy car park.

Case judgement – The pursuer's case under the 1960 Act failed, because the court held that the occupiers had in place a system for treatment of ice in the car park, that the system was a reasonable one, and that it had been properly implemented on the day in question.

3.4 Case Issue – Timing of remedial action

Case title and date – Nisbet v Orr and anon, 2002

Case outline – This was an indoor case, where a person slipped on a wet floor, but the judgement does have some bearing on the need for immediate action in appropriate cases.

Case judgement – The court said that **“when there is an evident and obvious danger, then certain duties of care will arise automatically and in effect contemporaneously with the appreciation of that danger.”** In the circumstances of this case, the court held that there was no reason why an employee should not have put cones and warning signs around a wet floor as soon as he was aware that the floor was in a slippery condition.

3.5 Case Issue – Occupier's knowledge of hazards on his/her land

Case title and date – Oldcorn v Purdon, 2002

Case outline – A child, who was 10 at the time of the incident, was severely burned when he jumped into what appeared to be an area of sandy soil but was in fact ash on top of burning ground caused by fire in old mine workings. There was a question as to whether the defenders, the occupiers of the land, were aware of the danger.

Case judgement – The court noted that if the defenders could not reasonably have known of the danger, the pursuer's case would have to fail, but in this case the judgement went on to say:
*“In an occupier's liability case, a pursuer normally does have to aver sufficient facts to permit the inference of such knowledge to a defender. However, it is not reasonable, in many cases, to expect a pursuer to be in a position to aver actual knowledge of the danger as a fact. On the other hand, if a danger...is proved to have existed on a person's land, then in some cases the pursuer may have to establish little else to prove knowledge, actual or constructive, than that fact plus the defender's occupation. This is because, **in many situations, it will be legitimate to infer knowledge from the existence of the danger on the land plus the defender's presence on the land as an occupier. An occupier must often be taken to know what is on his own land, albeit that this will not always be the case”.***

This judgement does indicate that long-standing features of the land may reasonably be assumed to be known by the occupier, in comparison to more short-term factors which may arise between inspections as in the previous cases.

Section 4 – Children and risks

4.1 Case Issue – Reasonable anticipation of childrens' presence

Case title and date – Dawson v Scottish Power, 1999

Case outline – A child of 11 was injured when climbing over the steel perimeter fence surrounding an electricity sub-station in order to retrieve a football.

Case judgement – The court affirmed the approach taken in earlier cases that the duty of care is owed to the particular pursuer. In this case, the injured person – being a child – belonged to “just that group of persons who could reasonably be foreseen to attempt to cross the fence” and a duty of care was therefore owed by the occupiers.

4.2 Case Issue – Reasonable anticipation of childrens' activities

Case title and date – Jolley v Sutton London Borough Council – House of Lords, 2000

Case outline – a child of 14 at the time of the incident, was injured when an abandoned boat, which he had been attempting to repair, fell on him. The defenders, who were the occupiers of the land on which the boat was situated, admitted that they had been in breach of their duty of care in failing to remove the boat, but argued that while it was reasonably foreseeable that a child could be injured while playing on the boat, it was not reasonably foreseeable that a child would attempt to repair the boat and be injured as a result.

Case judgement – The House of Lords rejected that argument and held that in the circumstances of the case, the accident which occurred was of a type which was reasonably foreseeable. The court specifically commented that **the ingenuity of children in finding ways of doing mischief to themselves should never be underestimated**, which has obvious significance for occupiers faced with the presence of children.

Section 5 – Animals, livestock, stock-fencing

5.1 Case Issue – Responsibility for an animal escaped from a fenced field

Case title and date – Wormald v H J Walker and Co, 2003 (and Gardiner v Millar, 1967 and Wark v Steel)

Case outline – The pursuer sustained injury when the vehicle which he was driving collided with a black cow belonging to the defenders. The collision took place in darkness, in a dip in the single track road along which the pursuer was driving. The cow had apparently escaped from a neighbouring field of the defenders through a hole in the fence. The pursuer alleged that the fences on the farm were in a state of disrepair and argued that there was an occupier's duty to take reasonable care to see that their livestock were kept in fields which were securely fenced, to prevent their livestock from straying on to the public road and owed a duty of care to users of the public road next to their fields to take reasonable care to maintain gates and fences in a stock-proof condition.

Case judgement – The court dismissed this case, and its judgement used the earlier case of Gardiner v Miller, 1967 and in particular adopted the conclusion of Lord Thomson in that case, in which he said:
*"In my opinion according to the law of Scotland there is no absolute duty to fence or keep gates shut so as to prevent domestic animals straying on to the public highway, but there may be, and in certain circumstances there is, a duty to take reasonable care to prevent such animals from straying on to the highway where there is a foreseeable risk of such straying causing injury to people using the highway. I think Sheriff Garrett in Wark v Steel states the law correctly thus: 'In my opinion then, the owner or occupier of a field adjoining a highway is bound to take reasonable care that his horses or other animals do not cause damage. It would not be reasonable to expect him to put up fences in areas where lands are not normally fenced, **nor in a fenced countryside could he be responsible if some unauthorised person opened his gate or a horse escaped through a gap the existence of which he could not reasonably be expected to have known.** He could not be liable because he would not be negligent, but if he opens the gate himself or otherwise negligently allows his horse to escape onto the road then he may be in breach of a duty if he had put it in a position in which having regard to all the circumstances it is likely to cause damage to persons lawfully using the highway.' I do not think it is possible to define the exact circumstances in which such a duty arises, and I doubt if it would ever be desirable to attempt to do so before the facts of any particular case had been determined."*

5.2 Case Issue – What constitutes an attack by a dog

Case title and date – Fairlie v Carruthers, 1996

Case outline – the pursuer was injured when she was knocked down by a dog owned by the defender while they were both exercising their dogs in a field regularly used by dog owners for that purpose. The pursuer argued that under the Animals (Scotland) Act 1987, the defender was strictly liable for the loss caused by her injury on the basis that she had been injured as a result of being "attacked or harried" by the dog.

Case judgement – It was accepted that, if the dog had indeed "attacked or harried" the pursuer, strict liability would have followed. The sheriff found, however, that the dog had neither attacked nor harried the pursuer. The sheriff said that a commonsense meaning must be given to these words. On the concept of harrying, he said that "the word 'harry' has a connotation of continual harassing or worrying" and noted that it would be "quite appropriate to describe a dog, for example, chasing sheep". A dog running into a person once, knocking her over and doing nothing more, as had happened here, could not however be described as harrying. In relation to the concept of attacking, the sheriff said that "the concept of an assault by a dog is a difficult one, but the use of the word 'attack' seems to me to imply some form of intent, just as an assault cannot happen accidentally, but at the very least amount to a deliberate act." He added that "it would be more consistent with an attack if the dog, having knocked [the person] down, had proceeded to take further action against her. The fact that she was merely knocked over and the dog did nothing more tends, if anything, to indicate that this was not an attack..." The case is useful in explaining the concepts of harrying and attacking as used in the 1987 Act.

Section 6 – Injury while using access rights

6.1 Case Issue – Duty of care for people on a right of way

Case title and date – Johnstone v Sweeney, 1985

Case outline – A couple walking on a towpath, which was a right of way, came to a gap in the path caused by erosion, and were both injured trying to negotiate the gap.

Case judgement – This action failed because, while under the 1960 Act an occupier does owe a duty of care to persons using a right of way, that duty is to take such care as in all the circumstances is reasonable. In this case it was judged an important fact that the persons using the towpath were there by virtue of the public right of way. The 1960 Act could not be regarded as imposing a positive duty to maintain the right of way, so there was no obligation to make the route safe. The occupier would have been liable, however, for any danger created by him on the route and for any failure beyond the mere passive failure to maintain.

Section 7 – Voluntary acceptance of risks

7.1 Case Issue – Voluntary acceptance of risks

Case title and date – Tomlinson v Congleton Borough Council – House of Lords, 2003

Case outline – as noted in section 2.2 above

Case judgement – This case also provided important guidance on the liability associated with people accepting risks that they know about. In the judgement, Lord Hoffman noted that the pursuer was a person of full capacity who had voluntarily and without any pressure engaged in an activity which had inherent risk. He 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 and lakes, that is their affair.”** Lord Hobhouse also referred to the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk.

7.2 Case Issue – Voluntary risk, and negligence

Case title and date – McCluskey v The Lord Advocate, 1994

Case outline – A person was injured during a family visit to Rogie Falls when she slipped on a narrow track and fell onto rocks.

Case judgement – The action was unsuccessful because the court concluded that no liability under the 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.

The court also concluded that, **even if the track had been in a dangerous condition, the onus was on the pursuer to demonstrate that it was the dangerous condition which caused the accident.** The evidence in the case simply showed that she had stumbled, slipped or tripped, so the accident was caused by the actions of the person injured, and not by any negligence of the occupier.

ENDNOTE

GENERAL PROCESS OF ASSESSING LIABILITY

In summary, in the normal process of assessing cases, the courts will generally examine a broadly sequential series of questions as follows :

- Did the occupier owe a duty of care to the visitor?
- If the answer is 'yes', what was the appropriate standard of care?
This will take account of
 - the status of the visitor (reasonably expected, etc)
 - the characteristics of the visitor (child, able-bodied, etc)
 - the nature of the dangers (obviousness, etc)
- Did the breach of the duty of care cause the injury or damage?
- Was the risk one for which the occupier is at law responsible?
- Were any suitable risk assessments and inspection regimes adhered to reasonably?
- Was the risk accepted by the visitor?
- Did the visitor's negligence contribute to the injury or damage?

REFERENCES AND SOURCES OF ADVICE ON MANAGING RISKS TO THE PUBLIC

Health and Safety Executive – www.hse.gov.uk

- *Five steps of risk assessment* HSE books 1998
- leaflets on safe working practices for forestry and for agriculture

Visitor Safety in the Countryside Group – *Managing Visitor Safety in the Countryside – Principles and Practice* (2003) – www.vscg.co.uk

Scottish Outdoor Access Code – www.outdooraccess-scotland.com

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Working with Scotland's people to care for our natural heritage.

Our aim:

Scotland's natural heritage is a local, national and global asset.

We promote its care and improvement, its responsible enjoyment, its greater understanding and appreciation, and its sustainable use now and for future generations.

Our operating principles:

We work in partnership, by co-operation, negotiation and consensus, where possible, with all relevant interests in Scotland: public, private and voluntary organisations, and individuals.

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©Scottish Natural Heritage 2005
ISBN: 1 85397 435 8
NP1.5K0505

Photography: Cover photography © Lorne Gill/SNH