

## CAIRNGORMS NATIONAL PARK AUTHORITY

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### FOR INFORMATION

**Title:**                    **Visitor Safety and Land Managers' Legal Liabilities  
in Relation to Outdoor Access**

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#### **Purpose**

The purpose of this paper is to inform the Board about the law relating to visitor safety and land managers' legal liabilities in relation to outdoor access in the National Park.

#### **Executive Summary**

The interpretation by a small number of land managers over the interaction between current liability law and the right of responsible access has led to a number of complaints being made to the National Park Authority. There has also been some uncertainty expressed by land managers over the liability implications of having a core path on their land. This paper clarifies that:

- a) the duty of care remains the same as existed before the passing of the Land Reform(Scotland) Act;
  - b) the Scottish Outdoor Access Code provides clear guidance for access takers which has, as one of its the three key principles, "*Take responsibility for your own actions;*"
  - c) there is no additional burden of liability as a consequence of having a core path; and
  - d) further dissemination of the advice received in preparing this paper will assist all in the better understanding of this subject.
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## VISITOR SAFETY AND LAND MANAGERS' LEGAL LIABILITIES IN RELATION TO OUTDOOR ACCESS – FOR INFORMATION

### Introduction

1. This paper summarises some aspects of the law relating to visitor safety and land managers' legal liabilities in the National Park. The paper has been prepared for two reasons:
  - a) there have been several complaints from members of the public about outdoor access issues in parts of the Park which have arisen because of misunderstandings about the legal situation;
  - b) concerns have been expressed by some land managers at meetings recently about aspects of the Core Paths Planning process, specifically the legal liabilities of having such paths designated on their ground.
2. Along with raising awareness of Board members, the paper will help to get accurate information into the public domain.
3. The paper is based on two sources of information. First, general information comes from an SNH publication on the subject<sup>1</sup> (which itself is based on work undertaken by the University of Aberdeen School of Legal Studies). Free copies are available from CNPA on request. The booklet (16 pages) is recommended reading for anyone managing land in the National Park. Secondly, more specific advice has been obtained from the National Park Authority's lawyers.
4. It should be emphasised that this paper is not a definitive interpretation of the law, and that cases are always decided on the individual merits of each case. Anyone considering a particular issue would be well advised to seek legal advice.

### Basic Legal Framework

5. There are five individual pieces of legislation that are directly relevant:
  - a) **Land Reform (Scotland) Act 2003, Part One** – establishes statutory access rights to land in Scotland and a requirement that people behave responsibly. Section 5 (2) of the Act clarifies that the extent of a land owner's duty of care is not affected by this Act. The associated Scottish Outdoor Access Code (which was approved by Parliament) defines what constitutes responsibly behaviour in a number of specific circumstances.
  - b) **Occupiers Liability (Scotland) Act 1960** – this defines that an "occupier" of land has a duty to show care to people on that land. The occupier is defined as being the person or body occupying or having

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<sup>1</sup> A Brief Guide to Occupiers' Legal Liabilities in Scotland in relation to Public Outdoor Access, SNH, Battleby, 2005

control of the 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. 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. What is reasonable will be decided on the merits of each case. An occupier is not normally expected to guard against dangers which are obvious (e.g. a steep bank or loch).

- c) **Health and Safety at Work Act 1974** – this places duties on employers (and the self employed) to “persons other than employees” i.e. members of the public and people taking access to the countryside. The basic requirement is to ensure, subject to reasonable practicability, that he/she does not create risks to any persons health and safety – for example, not to expose such people to risks to their health and safety when spraying crops or conducting a shoot. More specific direction is provided in associated Regulations (which introduce the concept of risk assessment) and in industry based Codes of Practice (for chainsaw operation).
- d) **Animals (Scotland) Act 1987** – this clarifies the strict liability for injury or damage caused by animals (including dogs, cattle, sheep, horses pigs goats, deer and certain wild animals).
- e) **Unfair Contracts Terms Act 1977, Part II** – this legislates on whether an occupier may attempt to disclaim or restrict liability for breach of the duty of care by, for example, displaying notices disclaiming liability at principal access points.

### **Issues Arising: People Known to be on the Premises**

- 6. Questions have arisen about whether an occupier owes a higher duty of care to people who he/she knows are likely to be present on the land than to other people. For example, if a land manager writes to people acknowledging that they will visit the land do they then have more responsibility than they would have had if people had wandered onto the land?
- 7. The most relevant legislation is the Occupiers' Liability Act described above. The occupier owes a duty of reasonable care to all persons entering onto his/her premises to see that the person does not suffer injury. This duty of care is irrespective of whether they have permission to be there or not. In passing, it should be noted that the law on this point is distinctly different in Scotland to that in England in Wales. What is reasonable will depend on the circumstances of each case.
- 8. Case law, as summarised in the SNH publication described above, suggests that the courts have, in the past, taken into account any knowledge that the occupier had that people were present on his/her land. However, that was only one of several factors that are considered and each case is judged on its particular circumstances. There is no higher duty of care for visitors known

to be on land *per se* and this will never be the sole determining factor in any case. For any case to succeed under the 1960 Act, it must be shown that:

- a) the person who allegedly caused the injury or damage owed a duty of care to the person who was injured or whose property was damaged;
  - b) this duty was breached by a failure to take reasonable care; and
  - c) the failure caused the injury or damage.
9. Injuries can be caused by a wide variety of factors, including for example:
- a) the physical condition of the site (e.g. steepness of slope, vegetation cover, condition of structures to be climbed over, etc);
  - b) land management activities ongoing at the time (e.g. tree felling, moving stock, etc);
  - c) the age, ability and behaviour of visitors or the equipment they have with them; and
  - d) weather conditions.
10. Land managers can ensure visitor safety (and protect themselves against the consequences of legal action being taken against them) by adopting a risk management process. This is designed to identify any uncertainty over whether the factors above could cause injury to others with a view to minimising the risk of injury. Undertaking such assessments is part of the day to day activity for best practice land management.
11. Land managers will only be able to influence or control some of the factors listed in paragraph 8 above. It is clear that both parties (i.e. land managers and recreational users) have responsibilities to ensure that people are not injured. This is reinforced in the Scottish Outdoor Access Code which stipulates as one of its three central principles that people must take responsibility for their own actions. The Code will have evidential status in the courts (in a similar way to the Highway Code). In the future this should help land managers as it will be clearer than it was before the legislation was passed, what steps the recreational users should have taken to look after themselves and others in particular situations.

#### **Issues Arising: Core Paths**

12. Concerns have also been expressed that the designation of Core Paths will increase land managers' liabilities.
13. Legal advice has confirmed that the situation regarding Core Paths is similar to that described above – i.e. the duty of care owed by land managers will be the same to all visitors, whether or not they are on Core Paths. If an accident or injury occurs, the courts will have to analyse all the relevant circumstances of the case, including the characteristics of the visitor, in deciding liability. The issue of whether or not a person is on a Core Path will not, on its own, be a deciding factor. There is therefore no difference between a designated Core Path and another path – or indeed between a Core Path and any other land

that is know by the land manger to be frequently used by members of the public.

14. A path that is part of a properly signposted and managed system of Core Paths may actually help the land manager in terms of understanding where most visitors will be, and how they are likely to behave, most of the time. Once again, adopting risk management procedures will help ensure visitor safety.

### **Carrying Forward This Work**

15. In working towards completion and implementation of the Core Paths Plan, staff from Cairngorms National Park Authority will give attention to:
  - a) raising awareness of the issues described in this paper;
  - b) monitoring case law as it develops;
  - c) directing land managers and others to best practice advice on risk assessment, use of signs and so on in order to promote visitor safety;
  - d) determining what further assistance might be given to land managers to ensure that Core Paths are designated and work effectively; and
  - e) liaising with other access authorities and, if necessary, seeking legal advice to help address any further queries.

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