



Department of the
Environment
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Department of
**Finance and
Personnel**
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Occupiers' Liability Law in the Context of Access to the Countryside in Northern Ireland

INFORMATION LEAFLET



INTRODUCTION

The purpose of this brief information leaflet is to describe the relationship between the Government's aim in promoting managed access to the countryside and the role of occupiers' liability legislation. The countryside of Northern Ireland is an important resource enjoyed by many people for recreation, and the Office of Law Reform¹ has been tasked with examining the current occupiers' liability legislation and considering whether change to this legislation could facilitate greater access opportunities. The information contained in this leaflet has been produced after consulting with a wide range of bodies representing farmers and others such as walkers who wish to access the open countryside. The leaflet seeks to address the concerns expressed to us.

Access to the countryside is a complex issue which is affected by many factors including liability for injury, damage to property, fears of spread of disease and the control of animals. In our view these concerns should be addressed through a system of managed access. We do not consider that the current provisions for occupiers' liability are a barrier to access. We believe there is a *perception* amongst farmers and other landowners that the current occupiers' liability legislation imposes unreasonable burdens on landowners permitting access in favour of entrants, be they authorised visitors or others. We are aware that landowners have concerns about the level of care owed to such persons and the liability for which they may be at risk. We are also aware that many landowners fear an increase in their public liability insurance premiums if greater access to the countryside is encouraged. There is scope for district councils to provide financial assistance with insurance premiums when access to open country or pathways is

¹ From 1st April 2007 the functions of the Office of Law Reform are carried out by the newly established Civil Law Reform Division of the Departmental Solicitor's Office within the Department of Finance and Personnel.

agreed by the landowner, and the Department of Environment is actively pursuing this. However, the key message of this leaflet is that landowners/farmers have little to fear from the current occupiers' liability regime.

There is in fact no known evidence that successful claims are being made in Northern Ireland against private landowners as a result of allowing use of permissive paths or otherwise allowing their land to be used for informal open-air recreation. Nor is there significant evidence of speculative claims being made and settled before the case comes to trial or of claims for compensation being awarded by courts. Indeed, a common point of agreement amongst all those concerned with access to the countryside is the need to start from the principle that those using the countryside should be primarily responsible for their own safety. This view is supported by the leading case of *Tomlinson v Congleton Borough Council* which is discussed in more detail below.

Glossary of Terms

“The 1957 Act” means the Occupiers’ Liability Act (Northern Ireland) 1957

“The 1983 Order” means the Access to the Countryside (Northern Ireland) Order 1983

“The 1986 Order” means the Recreation and Youth Services (Northern Ireland) Order 1986

“The 1987 Order” means the Occupiers’ Liability (Northern Ireland) Order 1987

ACCESS TO THE COUNTRYSIDE

Open Air Access

The government is committed to encouraging managed and agreed access to the countryside, on both privately and publicly owned land. The existing legislative framework in Northern Ireland is found mainly in the Access to the Countryside (Northern Ireland) Order 1983 (the 1983 Order). This legislation gives district councils power to enter into *public path creation agreements* with landowners creating public rights along linear routes, and *access agreements* permitting persons to have access to open country for open-air recreation. The legislation also gives district councils powers to make *public path creation orders and access orders*. In respect of both agreements and orders, payments can be made by the district councils to the landowners concerned.

In 1999 the Department of Environment (DOE) undertook an access consultation which included the question of whether a right to roam policy should be established in Northern Ireland, similar to that implemented in England & Wales by the Countryside and Rights of Way Act 2000. The response to this consultation revealed strong opposition to any proposed statutory freedom to roam over unenclosed, uncultivated land in Northern Ireland and DOE has discounted this proposal. The consultation did however reveal a widespread concern amongst landowners as regards any liability which may flow from a new policy of encouraging increased access to the countryside.

Informal Access

There is also considerable informal access to the countryside which takes place outside the framework of the 1983 Order. This informal access has raised fears among landowners because they are unsure of the degree of liability they may owe to people who injure themselves on their land. The issue of informal access is discussed later with specific regard to the current occupiers' liability regime.

National Parks

A further initiative relates to the establishment of National Parks in Northern Ireland. In October 2004 DOE issued a discussion paper, which highlighted the fact that Northern Ireland was almost unique in the world in not having National Parks. The paper examined the inadequacy of existing legislation in Northern Ireland dealing with establishing and managing National Parks here. New legislation is currently being considered which would provide a new statutory structure for such Parks. One key concern which has emerged from responses to the discussion paper and also at various stakeholder meetings is the duty of care which occupiers within a national park would owe to persons accessing them. We would wish to emphasise that the designation of an area as a National Park does not mean that the public has a right to roam across all land within the Park area.

Forestry Lands

A more recent initiative has emerged from the Department of Agriculture and Rural Development (DARD) which recommends legislation providing a statutory right of access to their forestry land. DARD currently owns approximately three quarters of all forests in Northern Ireland. Alongside proposals for further afforestation and commercial use of forests, DARD is proposing an access regime with its liability limited in some way in relation to those forested areas owned by it.

OCCUPIERS' LIABILITY

The duty owed by a landowner towards those accessing land is a complex issue and its scope will depend on a number of factors. However, those accessing land need to be aware of their responsibilities not only for their own safety but also to the owners of the land. For example, landowners are naturally concerned about issues of bio-security and animal welfare and walkers and others should respect any warning of such dangers.

All of these issues can most satisfactorily be addressed in the context of a system of managed access to land. Before discussing the provision currently made for access it is necessary to explain the current law on occupiers' liability.

Occupiers' Liability Legislation

Occupiers of land have certain responsibilities, or a "duty of care", towards people who come on to their land. Two pieces of legislation determine what this level of responsibility is: the Occupiers' Liability Act (Northern Ireland) 1957 (the 1957 Act) and the Occupiers' Liability (Northern Ireland) Order 1987 (the 1987 Order). The 1957 Act governs an occupier's duty of care towards "visitors" to the land. The 1987 Order determines whether a duty is owed towards "non-visitors", such as trespassers, and the extent of that duty.

It is the fact of agreement, expressed or implied, of the occupier in relation to the presence of someone on his land which is the justification for treating visitors and trespassers differently in law. This was explained by Lord Hoffmann in the leading case of *Tomlinson v Congleton Borough Council* [2003] in these words:

"...Parliament recognised that it would often be unduly burdensome to require landowners to take steps to protect the safety of people who came upon their land without permission. They should not ordinarily be able to force duties upon unwilling hosts."

Visitors

A visitor is someone who has been expressly or impliedly invited on to the land by the occupier. The occupier of land owes a common duty of care to visitors which is defined as a duty to take such care as, in all the circumstances of the case, is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the landowner to be there. Visitors may be on someone else's land for a variety of reasons. For example they may

have been expressly invited to a party or other social gathering. Or, they may have an implied permission from the landowner to be there. People in this category would be a person delivering goods ordered by the landowner or people using a path subject to a permissive path agreement. This category can extend even to those people who cross the land without the owner's express permission but where he does not object to them doing so ("tacit consent" users).

In *Tomlinson* (which was about an accident which befell a young man who had dived into open water), Lord Hoffmann commented that if the man had been a visitor:

"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 or lakes, that is their affair."

Trespassers

A trespasser, on the other hand, is a person who has neither the right nor permission to enter the premises. The duty a landowner owes to trespassers is lower than that owed to visitors. The 1987 Order does not place an automatic duty on landowners towards trespassers. A trespasser who is injured will first have to show that it was the state of the premises or something done there which causes the injury. Even if the trespasser can establish this the landowner will only have a duty towards the trespasser if –

- he was aware of the danger or had reasonable grounds to believe that it existed; and
- he knew or had reasonable grounds to believe that the trespasser was in the vicinity of the danger or that he may come into the vicinity of the danger; and
- the risk of injury is one against which, in all the circumstances of the case, he may reasonably have been expected to offer the trespasser some protection.

The leading case of Tomlinson provides an example of the common sense approach courts will adopt in relation to trespassers. In that case 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.”

What this case demonstrates clearly is that it is very difficult for visitors or trespassers to successfully claim compensation for accidents which occur in the natural environment. This case is a clear signal to landowners that they have little to fear from accidents which occur as a result of the natural state of their land. Different considerations may apply to man-made structures on land such as gates or stiles.

There is no known reported case of adult trespassers successfully suing a landowner because of an injury caused due to natural features arising in the countryside.

OCCUPIERS' LIABILITY LEGISLATION IN CONTEXT

The next part of the information leaflet discusses the various ways in which people access the countryside and the likely duty and level of liability which a landowner may owe.

Public rights of way and public path creation agreements and orders

A public right of way over land is a right of way over a defined linear route. It exists in perpetuity, unless extinguished by a due legal process. The right is exercisable by all members of the public. Rights of way exist both in urban and rural environments. In the context of access to the countryside rights of way can occur in two situations:

- existing public rights of way; and
- rights of way which arise by virtue of a public path creation agreement entered into by the landowner and the district council.

The duty of the owner of the land where a right of way is situated is very limited. The owner of the land has no duty at common law to maintain the surface of the right of way so no liability will arise if the owner allows the surface of the right of way to fall into disrepair. Liability will only arise if the owner does something which creates a defect or danger to potential users of the right of way.

Under the 1983 Order district councils have a duty to assert and protect existing public rights of way. To date approximately 170 existing public rights of way have been asserted and protected by district councils. At the same time only a very limited number of public path creation agreements or orders have been made.

Access agreements and orders

The 1983 Order makes provision for a district council to enter into an access agreement with a landowner for the purpose of enabling the public to have access to open countryside for open-air recreation. If agreement with the landowner cannot be reached the district council has power to make an access order. The duty owed by the landowner towards members of the public entering land identified by an access agreement or order is governed by the 1987 Order – **the lower duty owed to people who are not visitors of the landowner**. The *Tomlinson* case identified the difficulty such an entrant will have in being able to sue successfully the landowner for any injury which is the result of the entrant undertaking potentially risky activities or simply stumbling over uneven ground. We are not aware of any successful court cases of this type in Northern Ireland.

Long distance routes

Long distance routes are routes which have been formally approved under the 1983 Order. The approved route may comprise existing rights of way, public path creation agreements, permissive path agreements as well as privately owned land. The liability which may arise from injury along the route will depend on the arrangements

applying to that particular part of the route. Hence liability may arise at common law or under the occupiers' liability regime. There are approximately 15 long distance routes in the Province.

Permissive path agreements

Permissive path agreements are arrangements between a district council and a landowner outside the 1983 Order by which the landowner allows people to cross his land over a designated route. Permissive path agreements are entered into under the 1986 Order. These agreements generally run for a number of years and do not create a public right of way over the route. District councils may agree to provide insurance cover to landowners. Approximately 45 permissive path agreements have been negotiated to date. Because the landowner has consented to the public using the route, subject to any conditions contained in the permissive path agreement, it is very likely that any entrant will be considered as a visitor. As a result the landowner will owe the entrant the common duty of care under the 1957 Act.

Express consent to access

Where a landowner expressly consents to people accessing his land those people are his visitors and he will owe them the common duty of care under the 1957 Act. If a landowner is aware of a dangerous feature on his land he would be advised to warn all entrants of that danger.

Informal access with tacit consent (“*de facto* access”)

The most problematic area of occupiers' liability law is deciding whether a person entering onto land without express permission is owed the duty under the 1957 Act or the 1987 Order. The difficulty arises in the following type of case. A landowner has not expressly allowed people to come on to his land but the practice has continued for some time and he has not taken steps to prevent the access. Has the landowner

“tacitly” consented to such people using his land by allowing *de facto* access? The answer to this will depend on the facts of each case. However, whether these people walking across land have the implied consent of the landowner or they are classed as trespassers there will, in our view of the current law as set out in *Tomlinson*, be little likelihood of a successful claim for damages arising from normal activities or risks.

Access to the land has been denied by the landowner

Generally in situations where a landowner has expressly denied access to his land any person entering the land will be regarded as a trespasser. The landowner will owe to such people the limited duty set out in the 1987 Order.

The Table below sets out in summary form the types of access to the countryside discussed above and the issues of occupiers’ liability which may arise.

	Access Arrangement	Liability of Occupier/Landowner
1.	Existing Public Rights of Way	Common law liability
2.	Public Path Creation Agreements/ Orders under the 1983 Order	Creating new public rights of way: common law liability
3.	Access Agreements/ Orders under the 1983 Order	Duty owed under 1987 Order
4.	Long Distance Routes under the 1983 Order	Includes both public rights of way (common law liability) and other routes (no mention of liability or agreement of landowner)
5.	Permissive Path Agreements under Article 10 of the 1986 Order	Duty owed under 1957 Act

	Access Arrangement	Liability of Occupier/Landowner
6.	Express Consent to Access	Duty owed under the 1957 Act
7.	Informal Access with Tacit Consent	Duty owed under the 1957 Act if consent proved
8.	Access Denied by Landowner etc	Duty owed under 1987 Order

WHAT IF I AM CONCERNED ABOUT ACCESS TO MY LAND?

If you are worried about the liability you might owe to people accessing your land you could:

- contact your local district council and discuss with them the possibility of entering into a public path creation agreement or an access agreement under the 1983 Order. A public path creation agreement will impose on you the common law duty relating to public rights of way which is simply not to create a danger to potential users of the path. If you enter into an access agreement with the district council you will only owe to users of the land the duty owed to trespassers. Financial payments may be available for such agreements;
- or you may wish to enter into a permissive path agreement, although this will carry a higher level of duty to those crossing the agreed paths as such people will be treated as visitors. Some district councils will consider meeting the costs of insurance for permissive paths;
- or you may wish to consent formally or informally to people being on your land – in this case it is extremely unlikely that a person injuring himself will be able to successfully sue if the injury is due to the natural state of the land;
- or you may wish to put up signs warning potential entrants of any dangers on the land;

- or you may put up “No liability” signs, provided you are not in the countryside recreation business;
- or you may wish to fence off part of the land you want protected (for example cultivated land);
- or if there are any man-made structures on your land, such as stiles or gates, it would be sensible to maintain these in reasonable order.

FURTHER INFORMATION

More information on access issues can be found in the DOE’s “Red Book”, *A Guide to Public Rights of Way and Access to the Countryside* which can be found on the website of the Environment and Heritage Service at www.ehsni.gov.uk/natural/country_legal.html.

While it is hoped that the information in this leaflet and the Red Book is helpful, neither is intended to be a definitive statement of the law. **For legal advice you should consult a solicitor.**

This leaflet appears on the website of the Department of Finance and Personnel at www.dfpni.gov.uk, the Planning and Environmental Policy Group’s website at www.doeni.gov.uk and on the website of the Environment and Heritage Service at www.ehsni.gov.uk. Further copies may be obtained by contacting:

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