

Whose Fault Is It Anyway?

A Review of Occupiers' Liability
Relating to the
Recreational Use of the Countryside in Northern Ireland

Consultant's Final Report and Recommendations

Made to the
Northern Ireland Countryside Access and Activities Network

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1. INTRODUCTION

1.1 Background

There has long been widespread concern throughout the farming and landowning community in Northern Ireland over the legal liability occupiers may have towards members of the public who are using their land for informal recreation purposes.

The question of occupiers' liability was identified as one of the key issues in both the 1993 study of Access to the Northern Ireland Countryside (Peter Scott Planning Services) and, more recently, in the Department of the Environment's wide ranging consultation document on *Providing for Access to the Northern Ireland Countryside* published in 1999. Indeed, it remains one of the few major issues identified in the 1994 study on which substantial progress has not subsequently been made; a failure made all the more significant by the paucity of rights of way throughout Northern Ireland on the one hand and the strong desire, on the other, to achieve greater public access to the countryside through negotiation and agreement.

The current concerns were succinctly summarised in the Department's 1999 consultation document which noted that:

"It is widely believed throughout the farming community that members of the public in Ireland are especially inclined to seek damages for any injuries they sustain. Many also feel that this trend is increasing, encouraged by the over generous awards often made by the courts to claimants. There is, however, little or no evidence that liability claims are being made, in practice, in Northern Ireland against private landowners by those using the countryside for recreation. Nor is there any evidence of an increase in farmers' insurance premiums to reflect a growing risk that such claims might be made.

"A further problem is that the law on liability is complicated and many farmers are uncertain of their legal position. While many of the worries that farmers have may be groundless, it would clearly be wrong to suggest that an adverse claim could never arise in any circumstances. Nor is it easy to give unequivocal guidance on what a farmer should or should not do to protect himself. In addition, a large number of farmers are unable to afford the cost of public liability insurance cover. They are particularly fearful of the consequences of an adverse claim being made against them, no matter how remote the possibility of such a claim might be."

1.2 The Countryside Access and Activities Network's study

It is against this background that the Environment and Heritage Service of the Department of the Environment has asked the Northern Ireland Countryside Access and Activities Network (CAAN) to facilitate the current study. The study's aims are:

- to review the existing Northern Ireland Occupiers' Liability legislation specifically as it relates to countryside recreation;
- to consider the possible advantages and disadvantages of changing the law based on models from elsewhere;
- through a process of wide consultation, develop and submit to the Department a document outlining key recommendations and actions for dealing with the issue of occupiers' liability as it relates to countryside recreation in Northern Ireland.

Following the initial series of meetings and consultation workshops held in September 2000 a interim report with draft recommendations was presented to, and accepted by, the Network on 6th December. A summary of that report together with the draft recommendations was published in January 2001 and circulated widely, including amongst the farming community and other relevant bodies and organisations. Two further public meetings were also held, together with a meeting with the Ulster Farmer's Union to discuss the Union's specific practical concerns.

This final report and recommendations is intended to form the basis of the Countryside Access and Activities Network's submission to the Department, setting out the legislative changes and other measures which are needed in order to help resolve the issue of occupiers' liability.

1.3 The study process and structure of this report

The Consultant's preliminary report to the Countryside Access and Activities Network was made in December 2000 following an initial series of nine consultation workshops and meetings (see appendix A). These took place between 4th and 8th September 2000 and were mainly with the wide range of bodies that have an interest in, or involvement with, countryside recreation in Northern Ireland and which are represented on the Network. An initial open public meeting was also held on the evening of 7th September at the Civic Centre, Craigavon, attended by around 50 people.

All of these workshops and meetings were divided into three sections, with each section comprising an opening presentation to set out and explain the issues involved followed by a wide-ranging discussion between all the participants. The interim report similarly followed this structure, as does this final report. The three initial sections of the report therefore discuss:

- the current legislation in Northern Ireland and what it means in practice;
- the different approaches adopted by some other jurisdictions and their possible relevance to Northern Ireland;
- the relevance of the proposed changes to legislation in other countries of the UK and the Occupiers' Liability Act in the Republic of Ireland.

To ensure as wide as possible understanding and debate of the issues involved, two further public meetings were held to discuss the conclusions and draft recommendations in the Consultant's interim report. The meetings (which were advertised throughout Northern Ireland) were in Cookstown on the evening of 13th February and Belfast on the evening of 14th February 2001 and were attended by around 20 and 25 people respectively. In practice (with the exception of the question of whether the occupier's revised duty of liability should also apply towards users on a public right of way, which was raised at the Belfast meeting and is discussed below in section 5.7) there appeared to be little or no disagreement with the Consultant's draft recommendations. Much of the discussion at both meetings focussed instead on the other problems that could be associated with public access to the countryside - the need to encourage high standards of behaviour and ensure that access is properly managed, and the severe problems faced by owners arising from widespread anti-social behaviour in urban fringe areas such as the Belfast Hills. The comparatively low levels of attendance at both meetings compared to that at other similar public meetings to discuss countryside access issues in Northern Ireland may also be indicative of a general

agreement with the Consultant's recommendations.

A working meeting was also held on 14th February 2000 with the Ulster Farmers' Union. While this was concerned with a number of detailed, practical concerns, the Union said that it welcomed and supported the broad thrust of the interim report and the recommendations it contained.

The issues arising from all three sets of discussion have been reflected as appropriate in detailed changes made throughout this final report. Nevertheless, the broad level of agreement has meant that the final two sections remain largely as proposed in the interim report. These set out the overall conclusions reached by the Consultant in the light of the study and his recommendations to the Network.

Members of the Network will appreciate that (while every effort has been made to ensure the report is accurate as possible) nothing in the report is intended as a definitive statement of the law, either in Northern Ireland or other jurisdictions, nor should the report be relied on for such purposes.

2. THE CURRENT POSITION

2.1 Occupiers' position under current legislation

The liability which an occupier has towards anyone who is on his or her land (whether for recreation or any other purpose) is currently determined under the Occupiers' Liability Act 1957 and the Occupiers' Liability (NI) Order 1987. The legislation resulted from comprehensive reviews by the Law Reform Committee in 1954 and the Law Commission in 1984 and is identical to that which applies in England and Wales, although not that in Scotland.

The legislation distinguishes for the purposes of liability between two types of entrant. A 'visitor' is a person who has some form of expressed or implied permission or consent to be on the land. A 'trespasser' is a person who is on the occupier's land without any such permission or consent. The 'occupier' for these purposes is the person who effectively has control over the land. Depending on the circumstances, this may or may not be the same person as the landowner.

2.2 Liability towards a visitor

Under the 1957 Act, the occupier has a 'common duty to care' to anyone who is a 'visitor'. The duty is not an absolute one, however. Rather it is a qualified duty; to take such care as is reasonable in all the circumstances to see that the visitor will be reasonably safe for the purposes for which he or she is permitted to be there.

There are also several other important qualifications, in particular that the occupier has no obligation to anyone who willingly accepts a risk. This is the statutory enactment of the common law principle *Volenti Non Fit Injuria* ('a willing person cannot be injured', ie injured in law) and means that anyone who engages in an activity that has a degree of risk associated with it, such as mountaineering, hang-gliding, caving, or even simply walking in the countryside over unmade paths and tracks, will be regarded by the courts as having willingly accepted the risk involved. In addition, the occupier will often be able to discharge his or her obligations simply by putting up a notice or by giving a verbal warning of the danger and discouraging people from taking risks. A court, in taking into account all the circumstances surrounding a claim, is required to have regard to any such warning. It will also invariably have regard to the claimant's own contributory negligence; that is the extent to which the injured person was responsible for or contributed to the accident by his or her own behaviour.

On the other hand, the occupier must be prepared for children to be less careful than adults. It may therefore be necessary to take special precautions where children can be expected to come onto the land and where there is something on the land which would be an attraction to them and which may be dangerous. An example would be a derelict building on land adjacent to an urban housing development.

2.3 Liability towards trespassers

The Occupiers' Liability (NI) Order 1987 extended the duty care to trespassers, but only if it can be shown that the occupier:

- knew, or should have known, that a danger existed on the land; and,
- knew, or could have anticipated, that people might come near that danger; and
- could reasonably have been expected to protect a trespasser against the danger.

In recommending this change in the law in 1984, the Law Commission specifically commented that they would not expect the change to give rise to liability claims arising from the recreational use of land such as mountain and moorland. This is because the natural hazards to be found in such areas are not ones that an occupier could be expected to protect people against.

2.4 Liability towards users on a right of way

Because anyone using a public right of way is regarded in law as doing so "as of right" rather than with the occupier's permission, the question of liability is determined under common law rather than under the 1957 Act. Nor is the occupier responsible in any way for the condition or the safety of a right of way; rather the public must take the condition of the path as they find it. These underlying common law principles (which have been strongly confirmed on appeal by the Law Lords in a case specifically relating to Northern Ireland) mean in practice that the occupier will risk being liable only if he or she deliberately injures a path user or otherwise does something which is blatantly negligent. Paradoxically, therefore, anyone using a public right of way may be less protected than a person who is trespassing.

Whether liability could arise toward a path user who is injured as a result of owner's failure to maintain any stiles or gates on a right of way in a safe condition is a separate legal issue which has never been considered by the courts.

2.5 Liability issues in practice: The farming community's concerns

At the start of the discussions, several contributors said they welcomed the Consultant's clear explanation of the current position. They had not previously appreciated either the comparatively limited nature of the occupiers' duty of care or the other factors that a court would take into account.

It was clear from the workshops and meetings however that there continues to be wide concern throughout the farming community about occupiers' liability. At a personal level, many owners are apprehensive about the risk of a claim being made against them and are therefore wary of allowing any public access over their land. There is also a wide belief that the legal system is biased and that the courts are predisposed to make over-generous settlements to any claimants, including in respect of the kind of 'tripping accidents' and other minor injuries which can easily take place in the countryside.

The many occupiers that have no liability insurance are - understandably - often particularly apprehensive. But the point was made that, even if the occupier is insured, an adverse claim will still give rise to considerable worry and uncertainty. It is therefore something that all occupiers would wish to avoid. The wide advertising of offers to pursue liability claims on a 'no win, no fee' basis, the growing tendency within society to seek compensation for any

injustice or injury, and the frequent publicity given to high compensation settlements all add to the occupiers' feeling of vulnerability and encourage a siege mentality.

2.6 Incidents of liability claims arising in practice

In looking at the incidents of liability claims that arise in practice it is important to bear in mind that not all claims may have been reported (for example, occasional claims may have been settled out of court) and also that such claims can take several years to come to fruition. There is always the possibility, therefore, that a claim or potential claim may exist which is not yet known about.

With these caveats, however, the current study mirrored that carried out in 1993 as part of the NI Access Study¹ in finding no evidence whatsoever of excessive liability claims arising under the existing legislation. On the contrary, while claims may (and occasionally do) arise for other reasons, there are no known, substantiated cases in Northern Ireland of a claim for liability against a private landowner arising as direct consequence of allowing informal access to take place over his or her land. Even where land is owned by a public body and is specifically promoted for recreation, the number of liability claims remains extremely low in absolute terms. It was stated at one workshop, for example, that 25 liability claims have been made against the NI Forest Service in the past six years compared to an estimate two million recreational visits to its land each year. Only six of these claims had been pursued (and were either won by the Service or settled out of court for amounts ranging from £1,000 to £5,000) - a rate of around 1 claim per 2 million visitors. The remaining nineteen cases have either not been pursued or were pending.

The Forest Service's figures are broadly comparable to the data on liability claims and costs in England and Wales set out in a report made in 1998 by the Country Landowners' Association (CLA) on *Occupiers' Liability and Public Safety*. The National Trust, for example, recorded 47 incidents as having taken place between 1993 and 1997 on country properties where access is allowed free of charge. These in turn gave rise to 15 claims being made, compared to an estimated 50 million visits a year to such properties. Similarly, the British Mountaineering Council, Ramblers' Association, Countryside Council for Wales and Forestry Commission were either not aware of any liability claims, or said the number of claims was exceptionally low, even although they were aware that a number of incidents (including some deaths) take place each year.

Nevertheless, the CLA report recognises that the cost of dealing with the few liability claims that do arise is often considerable, even when the claim is not followed through or is settled out of court. This point was also emphasised by the Forest Service. Similarly, the Ulster Farmers' Union stressed that a claim, or even the threat of a claim, may well have devastating and far-reaching consequences for the farmer concerned. Nor, in today's increasingly litigious society, can there be any guarantee that the present position regarding the very low level of claims will be maintained.

2.7 Interpretation of the legislation by the courts

There is, in the same way, no evidence in practice to bear out the widespread suspicion that the courts tend either unduly to favour a claimant or are unreasonable in their expectations of the occupier, even in relation to those cases involving children. On the contrary, such

¹ *Study of Access to the Northern Ireland Countryside* (1993). Peter Scot Planning Services for the Environment Service of the DOE, NI Tourist Board and NI Sport Council.

cases as have been reported (as determined in the English and Scottish courts) show the courts to have taken a common-sense, pragmatic approach including over such matters as the extent to which the plaintiff contributed to his own injuries and the degree to which it was practical and reasonable to have expected the occupier to protect or warn a plaintiff against the danger which was encountered.

2.8 Scope for promoting better understanding

It was recognised in the workshop discussions that, despite the exceptionally small number of liability claims and the sensible way such claims have been dealt with in the past by the courts, it is impossible to give the kind of categorical assurance that many farmers seek. As has already been stated, it would be wrong to suggest that an averse claim could never arise in any circumstance or that a court would never, in the future, come to a perverse or inconsistent judgement. Nor is it easy, under the current legislation, to give unequivocal guidance on what a farmer should or not should do to protect himself.

There is still scope however for making sure that the provisions of the existing legislation are better understood, and to promote a factual understanding of the current position so as to counter the negative impressions which occupiers have. Part of this should be to ensure that clear, easy to understand information is widely available. But it was also noted at one workshop that there are currently no sources of personal guidance that an individual occupier in NI can turn to when faced with a potential problem, other than to seek the advice of a solicitor. The feasibility of providing a one-to-one advice service, such as that which is available in England and Wales to members of the CLA and National Farmers' Union, should also therefore be investigated.

The user groups similarly considered there was scope for making it clear that they believed that all users should be primarily responsible for their own safety and that it was not part of the groups' culture to encourage or endorse liability claims. It may be possible to promote this understating, such as through a formal concordat, so that is widely appreciated throughout the farming community.

2.9 Settlement of claims out of court

Two further issues raised in the workshop discussions were the belief that insurance companies are inclined to settle many claims out of court, thereby possibly encouraging further speculative claims to be made, and whether the burden should not be on users to ensure they were adequately insured rather than on the occupier.

Some of the district councils' officers in particular said they believed that there is a growing tendency on the part of their insurers to settle minor liability claims out of court, although the cases involved do not necessary relate to countryside recreation. A representative of the farming community said he also had direct personal experience of his insurance company wishing to settle a claim out of court (although again not relating directly to a recreational issue). But the insurance companies are unwilling to release data either on the total number of liability claims or the numbers settled in this way and without this it is impossible to say whether this is a widespread practice or not.

Discussion between the CLA, the insurance companies and underwriters (as recorded in the CLA's 1998 report) suggests however that liability arising from the recreational use of private land is not generally regarded by the insurers themselves as a significant concern. This is borne out in Northern Ireland by the fact that some countryside officers have arranged for their council's own public liability insurance to be extended at no extra cost to cover the

permissive access arrangements negotiated over private land. Paradoxically, this lack of concern may itself mean that such cases that do arise are more likely to be settled out of court; the small number of cases, minor issues and relatively small sums involved making it not economically worthwhile for the companies to resist them.

2.10 Users' personal insurance

A suggestion sometimes made is that those using the countryside for recreation should be legally required to have personal injury insurance, so that the cost of insurance is borne by the users rather than falling on the owners and occupiers. In addition to the practical difficulties of enforcing such a requirement, however, there would be nothing in principle to stop the injured person also making a claim against the occupier. Some insurance companies may well encourage this, or actively take up a claim on the injured person's behalf as a means of recovering their insurance losses. The effect, therefore, could be to increase the number of liability claims against occupiers.

3. APPROACHES IN SOME OTHER JURISDICTIONS

3.1 Approaches studied and their common features

In the second part of the workshops a presentation was given on the way in which the question of occupiers' liability is dealt with in some other jurisdictions, followed by a wide discussion of the issues raised. The examples considered included two European countries where there is a strong customary tradition of access to the countryside (Norway and Sweden); a country (Denmark) where a limited right of recreational access has recently been re-established through legislation; and a number of countries where significant recreation takes place over private land and where the jurisdiction has its roots in the English legal system (South Africa, Australia, the USA and Canada).

The assessment presented showed there to be wide differences in approach. On the one hand are countries that prescribe in detail the nature of the occupier's duty of care and circumstances in which that duty will arise. On the other are those countries in which no more than the broad legal principles are laid down, either in legislation or at common law, and where the courts therefore have considerably more discretion to interpret and apply the law in the light of the facts and circumstances of each individual case. There are, however, a number of features that are common to all jurisdictions:

- The occupier invariably has some form of a duty of care (however minimal) towards other people who may be on the land. This duty relates both to the state of the land, to the extent that this is within the occupier's effective control, and the activities which take place on the land;
- That duty is greater towards a person who has been invited or who has or permission to be on the land than it is towards a trespasser;
- In meeting the duty, the occupier is expected to have special regard to the safety of children;
- Except where payment is made for access, however, it is a widely accepted principle that recreational users should be responsible for their own safety. A common way of achieving this is in many jurisdictions to regard recreational users as being, in law, equivalent to trespassers for liability purposes;
- All courts also take into account any contributory negligence on the part of the injured person and the principle of *Volenti Non Fit Injuria*. Recreational users are expected, therefore, to accept any risks inherent in their activities;
- The onus is invariably on the plaintiff to show why the occupier was at fault (even in a case where a child is involved).

It follows from this that while all of the jurisdictions examined require the recreational user to be primarily responsible for his or her own safety, the occupier is never completely absolved from all liability. In particular, the occupier is always required to act with what might be termed "reasonable humanity". He or she must not set out deliberately to harm or injure another person, even if that person is a trespasser, or otherwise act wilfully, maliciously or with reckless disregard for the person's safety.

3.2 North American model

Of the examples presented at the workshops, it was those from the USA and Canada which generated the most interest and which were generally thought to have the greatest relevance to the situation in Northern Ireland. They are therefore considered here in more detail.

It is worthwhile making the point that, until comparatively recently, occupiers' liability disputes coming before the courts in America were settled by reference to common law principles (as they were in the Republic of Ireland prior to the 1995 Act). There was no equivalent of the current Northern Ireland legislation in place. In 1968, the Supreme Court in California analysed the basis of this approach, coming to the conclusion that "the common law rules obscure rather than illuminate the proper consideration which should govern the determination of the question of duty" and that "the proper test to be applied ... is whether in the management of his property [the occupier] has acted as a reasonable man in view of the probability of injury to others..."¹. It would seem from other comments made that the Californian court would regard the current Northern Ireland legislation as, in fact, meeting that test.

This 1968 judgement was one of a number of factors influencing the development and rapid adoption throughout the USA of what have become known as *recreational use statutes*, with all 51 states having now done so. In Canada there was a similar move throughout the 1970's for each province to review its approach so that by the early 1980's at least six provinces had new Occupiers' Liability Acts in place.

3.3 Purpose and features of recreational use statutes

The American legislation varies in detail from state to state. But each state's code has the same primary purpose and also shares a number of common features with other states. The underlying policy is to encourage landowners to allow informal recreation to take place on their land without the fear of liability claims being made against them or the need to take out expensive insurance cover. It has also been said that the statutes "derive from the notion that it would be burdensome and unfair to impose upon farmers and other owners of vast tracts of land a duty of reasonable care to visitors who enter for recreational purposes, unless the owner received some substantial benefit from the visitor's presence".² In some states, the need to allow access to hunters so as to cull excessively large herds of wild animals was also an issue in revising the law.

¹ Peters J in *Rowland v Christian*, Supreme Court of California, 1968

² Joseph A. Page, *The Law of Premises Liability*, para.5.14, 2nd ed. 1986 and 1992 *Cumulative Supplement*.

3.4 Features relevant to Northern Ireland

The common features of the American statutes which were considered by the workshop participants to provide a useful model for amending legislation in Northern Ireland are as follows:

- Except as provided for below, the occupier owes no duty of care towards a trespasser, nor is the occupier liable for any injuries which a trespasser may incur or while on the land;
- In giving permission to a recreational user, the occupier:
 - gives no assurance that the land or any features on the land are safe for the purpose for which they are intended to be used;
 - does not owe the person any greater degree of care than that owed towards a trespasser;
 - has no liability or responsibility for any injuries the person may suffer or damage to the person's property whilst on the land;
- These provisions do not, however, protect the occupier from liability if he or she deliberately, wilfully or maliciously causes an injury to any person, including a trespasser.

The representatives of the Ulster Farmer's Union in particular saw these provisions as offering a potentially useful model in the Northern Ireland context. They meant that the occupier retained full control over the land, including discretion as to whether or not to allow people onto the land. But if the occupier wished to give permission, he or she could do so without the fear of any subsequent adverse consequences. Nor was the occupier liable towards anyone who chose to trespass on the land without permission.

3.5 Loss of immunity when charging for access

A key principle of these provisions is that the occupier's immunity from liability for personal injuries of damage to property suffered by recreational users normally applies only where recreational access takes place free of charge. Once a charge is made for access, either directly or indirectly, that immunity is lost. However, most states do allow the occupier to benefit from any fees which may arise from leasing the land to a public agency. Less commonly, a few also allow the occupier to benefit from other small amounts of income. For example, South Dakota allows the occupier to receive non-monetary gifts of up to \$10; Washington allows a charge to be made for cutting firewood; and Texas and Wisconsin respectively allow the occupier to receive revenue up to twice the level of the property's tax or \$2,000 annually. Where such revenue is permitted it is notionally intended to allow small-scale improvements to be made or to meet the cost of maintenance arising from the recreational use.

3.6 Land and activities to which recreational use statutes apply

The American statutes also each define, often in some detail, the land to which the recreational use statutes apply and what is meant by 'recreational activities'. The former typically includes all agricultural land, woods, forests and uncultivated land, together with water, private roads and tracks and any buildings, structures, machinery or vehicles, etc on that land. 'Recreational activities' are also usually widely defined, with many states setting out long, illustrative lists of the kind of activities that are included. (eg hunting, fishing,

swimming, boating, cycling, camping, driving for pleasure, riding, walking, nature study, water skiing, trapping, hang gliding, caving, mountaineering, and sledging). Discussion in the consultation workshops suggested, however, that it would be preferable in Northern Ireland to follow the simpler approach adopted in the Republic of Ireland's legislation (see section 4.5 below).

3.7 Success of the American legislation in practice

In considering the possible adoption of aspects of the US legislative model, a key question is whether the model has been successful? In particular, have recreational use statutes stood up to any adverse challenges in the courts and have they succeeded in encouraging landowners to allow greater informal recreation to take place over their land?

Nation-wide assessments carried out in 1985¹ and 1995² by researchers at Texas A&M University and a report published in 1997 of a National Private Landowners Survey (NPLOS) by the University of Georgia³ all suggest that, while the statutes have succeeded in reducing the threat of litigation, owners often continue to be reluctant to grant access. The 1995 study comments, for example, that "the so-called 'liability crisis' that has plagued efforts to increase access to private lands for recreation has been more mythical than real" and that "private landowners who allow free access to their property enjoy near-absolute immunity from liability." Nevertheless, the NPLO Survey records that "liability issues are persistent and of increasing concern to rural landowners" and that "given the prevalence of litigation in the US, the issue of granting access and risking a lawsuit seems a major influence on the availability of private land for public recreational use." While this reluctance may be down, in part, to a failure to explain the legislation adequately, both studies suggest that other factors may be at work. In a passage which is remarkably redolent of the situation in Northern Ireland, for example, the NPLO report refers to the right to own land, especially rural land, as being "an important part of our heritage as Americans."

While there is little information about how well recreational use statutes have stood up to scrutiny in the courts, there is nothing to suggest that any underlying weaknesses have been revealed. They also seem to have succeeded in severely limiting, as intended, the number of liability claims. For example, in Texas the researchers found only three recorded cases of litigation since recreational use statutes were passed in 1965. All three were against public agencies and only one of those cases found the agency concerned to be liable. No cases were noted against private Texas landowners.

¹ *Recreational Access to Private Lands; Beyond the Liability Hurdle*. Study by Ronald A. Kaiser & Brett A. Wright (1985), Texas A&M University. Reported in *the Journal of Soil and Water Conservation*, November-December, 478-481

² Study by Ronald A. Kaiser & Brett A. Wright (1995), George Mason University's Centre for Recreation and Resource Policy, Texas A&M University for the US Soil Conservation Service, as reported in *Texas A&M Agricultural News*, August 1995

³ *Private Land and Outdoor Recreation in the United States*, Study by R. Jeff Teasley, et al (1997), Department of Agriculture and Applied Economics, College of Agriculture and Environmental Science, University of Georgia.

4. RECENT AND PROPOSED CHANGES TO OTHER UK LEGISLATION AND RELEVANCE OF REPUBLIC OF IRELAND'S LEGISLATION

The third part of the workshops considered the relevance to Northern Ireland of the changes to legislation currently being proposed for other parts of the UK and of the relatively new legislation enacted in the Republic of Ireland in the Occupiers' Liability Act 1995. This part of the report also takes into account further recent developments in relation to both England and Wales and to Scotland which have taken place after the initial round of consultations.

4.1 Workshop discussion of the proposed changes to legislation in England and Wales

At the time of the consultation workshops, limited changes to the Occupiers' Liability Acts in England and Wales were being considered by Parliament as part of the Countryside and Rights of Way Bill. These changes arise as a direct consequence of the Government's intention to establish a right of access on foot to open country land (mountain, moorland, heath, etc) throughout England and Wales. They mean that, where a right of access exists, the occupier will have no duty of care towards a person exercising that right in respect of anything that is "a natural feature of the landscape".

The question of whether there is a similar need for a greater freedom for people to explore open countryside in Northern Ireland was, of course, one of the issues raised for debate in the Department of the Environment's 1999 consultation paper on *Providing for Access to the Northern Ireland Countryside*. No decisions have yet been taken by the Department on the outcome of those consultations.

There was broad agreement at the workshops, however, that the problems surrounding the issue of occupiers' liability in Northern Ireland were not ones that could be solved by making detailed changes to the degree of liability arising in respect of any particular type of land. The changes being proposed at that time in England and Wales were therefore not considered either useful or relevant in the context of Northern Ireland.

4.2 Later changes to the Countryside and Rights of Way Bill: definition of special considerations

In a later amendment to the Countryside and Rights of Way Bill, a sub-clause was added specifying the factors which must be taken into account in particular in deciding what duty (if any) the occupier has to anyone exercising the right of access to land granted under the Bill. It is notable that, in doing so, the GB legislation has followed a similar approach to that adopted in the Republic of Ireland as discussed in section 4.6 below. This in turn further strengthens the justification for adopting this approach in Northern Ireland

Three factors in particular are specified in what has now become section 13(3) of the Countryside and Rights of Way Act 2000. The first two of these are similar to the factors specified in the ROI legislation in relation to any recreational use of the countryside; that the new right of access in England and Wales "ought not to place an undue burden (whether financial or otherwise) on the occupier", and that regard should also be taken of "the importance of maintaining the character of the countryside including features of historic, traditional or archaeological interest".

The third factor, however, is a new one - that regard should also be taken of "any relevant guidance". In the context of England and Wales, this relates to any guidance given under

section 20 of the 2000 Act by the Countryside Agency or Countryside Council for Wales on how the public should exercise the new right of access to open country land. But the principle, that in determining possible liability the courts should take into account any relevant guidance given by a Government Department or Agency, is one that might usefully be adopted and applied more widely to countryside recreation in general throughout Northern Ireland. This would mean, for example, that guidance could be given by the Department about the need for members of the public to be responsible for their own safety, to ensure they are properly dressed and equipped and be prepared to accept the countryside as they find it, which a court would then be required to take into account in determining any liability issues.

While this particular suggestion has arisen only after the completion of the consultation workshops and meetings, it is nevertheless one which the Consultant considers is likely to be widely supported. It has therefore been included in the recommendations to the Network at section 5.5 below.

4.3 Proposals for new legislation in Scotland

In Scotland, proposals for fundamental reforms so as to establish a 'right of responsible public access' to all land and water have been put forward by the Scottish Natural Heritage's Access Forum and accepted by the Government as the basis for legislation by the Scottish Parliament. At the time of the consultation workshops, draft legislation was in the process of being prepared by the Scottish Executive as the basis for further consultations.

While these radical proposals have, in themselves, no direct relevance to the situation in Northern Ireland, the Consultant's interim report noted that a key part of the Access Forum's recommendations to the Scottish Executive was that visitors should take access at their own risk. The Forum also recommended that there was a strong argument for following the Republic of Ireland's approach so as "to shift the balance of responsibility onto recreational users". The Consultant therefore recommended that the Network should continue to monitor the approach as it is developed in Scotland, particularly given that both the Network and the Access Forum have identified similar liability objectives, the need in both countries to have regard to other common aspects of the wider legislative framework and the likely relevance of the ROI's legislation as a model.

The proposals for amending access legislation in Scotland have now taken a further step forward by the publication, at the end of February 2001, of two consultation papers by the Scottish Executive. These are a draft of the proposed Land Reform (Scotland) Bill and a draft Scottish Outdoor Access Code setting out the basis on which the right of 'responsible public access' is intended to operate in practice.

The proposed Outdoor Access Code (which is derived from further work by officers of Scottish Natural Heritage) acknowledges that, although the right of access will not increase the duty of care owed by land managers for people's safety, it could result in an increase in the number of accidents by encouraging more people to engage in informal recreational activities and widening the range of places that they visit. Under the heading 'Take personal responsibility for your own actions' the code therefore states that:

'You should exercise the right of access at your own risk and take responsibility for your own actions. You should also remember that informal, open-air recreation activities do carry a degree of risk and that the outdoors cannot and should not be made risk-free.'⁴

⁴ Paragraph 3.12, *A Draft Scottish Outdoor Access Code*, Scottish Executive, Edinburgh,

The draft bill makes it clear, however, that the Scottish Executive has decided not to act on the Access Forum's recommendation to also amend the current legislation on Occupiers' Liability. In discussing the outcome of the earlier consultations, chapter 3 of the Consultation Paper on the Draft Land Reform Bill states instead that:

'Concerns about liability were raised by almost a quarter of the respondents to the White Paper consultation, mainly farmers and landowners. They believed that once the right of access is in place, there could be a greater number of claims for damages against them and that their liability insurance premiums could increase. The proposal that individuals would exercise the right of access at their own risk did not appease the farming community. They pointed out that they would retain a 'duty of care' towards those exercising the right and suggested that the effect of a right of access to all land would be to increase the burden that this duty imposed upon them'.

'Outcome: In the light of the consultation exercise, further consideration was given to the issue of whether the law of liability should be changed so as to limit the 'duty of care' owed by the occupier. However Ministers have concluded that there is no need to change the existing law of liability.'⁵

The question of liability is similarly referred to in chapter 6, Consultations on the Draft Bill, setting out the issues to which the Executive wishes to draw attention. This states that:

During the consultations leading up to publication of the draft Bill, landowners and managers argued strongly that those exercising access rights should do so at their own risk. Ministers have given careful consideration to this issue and agree in principle that those exercising the rights should do so at their own risk. However, they do not consider it appropriate to amend the duty of care imposed on occupiers of land under the Occupiers' Liability (Scotland) Act 1960. These current arrangements are considered to work well and, therefore, the draft Bill proposes no amendments to the provisions of the 1960 Act. The draft Bill does not, therefore, extend (sic) the liability of landowners.⁶

The fact that Ministers in Scotland have come to the conclusion that the current legislation on occupiers' liability is working well and need not be changed (even in the light of the proposals for a greatly increased right of public access) does not of course preclude a different decision from being taken in the context of Northern Ireland. But this does reinforce the importance of ensuring that the justification for legislative change in Northern Ireland (as set out below in section 5.1) is fully and widely appreciated, including by senior Civil Servants that are responsible for briefing the Northern Ireland Assembly and by elected Members of the Assembly themselves. It also reinforces the importance of the Network's ongoing role in promoting that case and in directly lobbying for amending legislation, as recommended below in section 5.9.

At the same time, the Network should continue to monitor the development of the situation in Scotland. As the Scottish Executive recognises, the issue of Occupiers' Liability is already a concern amongst landowners and managers. The decision not to act on the Access Forum's

February 2001.

⁵ Paragraph 3.18, *Draft land Reform (Scotland) Bill; Consultation Paper*, Scottish Executive, Edinburgh, February 2001.

⁶ Paragraph 6.12, *Ibid.*

recommendations is therefore likely to be highly controversial aspects of the current consultations; a controversy which may well be increased moreover by the fact that a very different approach has been developed in Northern Ireland by CAAN in the course of this study.

4.4 Republic of Ireland's Occupiers Liability Act 1995

The final part of the workshops involved a detailed discussion of the extent to which the ROI's Occupiers' Liability Act 1995 might provide a model for the changes which need to be made in Northern Ireland. To facilitate this, the Consultant first explained the key provisions of the 1995 Act and how he understood the Act to be working in practice.

It is important to remember that the situation before the 1995 Act came into force in the Republic was not the same as that in Northern Ireland and that (as in America) there was no equivalent of the current NI Occupiers' Liability Acts. All liability cases were decided with reference to the common law, leading to confusion and uncertainty. To some extent, therefore, the provisions made in the 1995 Act can be seen as simply a catching-up with the position that has already existed in the North for many years. But the new legislation in the Republic also includes some important additional provisions. It is these provisions which might, in turn, be a useful model of the refinements that could be made to the Northern Ireland legislation.

The two main features of the 1995 Act which sets it apart from the legislation in Northern Ireland is the definition of a third type of entrant onto land - a "recreational user" - and the provision that the occupier's duty of care towards a recreation user shall be no more than the minimal duty which is owed to a trespasser. In both respects, the Republic's legislation is clearly modelled on the recreational use statutes adopted throughout the USA.

4.5 Definition of a 'recreational user' and 'recreational activity'

The 1995 Act defines a recreational user as being a person who is on the land, with or without the occupier's permission, and without charge (other than a reasonable charge for car parking), for the purpose of engaging in a recreational activity. "Recreational activity" in turn is defined simply as "any recreational activity conducted, whether alone or with others, in the open-air" and including sporting activity, scientific research and nature study, exploring caves, and visiting sites and buildings such as those of historical, archaeological, or traditional importance. The Irish legislation therefore avoids the approach of many American states in setting out long, illustrative lists of the type of activities that are intended to be within the definition. To this extent, it gives rather more freedom to the courts to interpret the definition, although there should normally be no difficulty in deciding whether something is, or is not, a recreational activity.

The two other categories of entrant, of 'visitor' and 'trespasser', remain broadly as defined in the NI legislation. A 'visitor' is a person, other than a recreational user, who is on the land with the occupier's expressed or implied permission. This includes members of the occupier's family and those who are there "for social reasons". A 'trespasser' is defined simply as an entrant who is neither a recreational user or a visitor.

4.6 The occupier's duty of care

The occupiers' duty of care towards a visitor under the 1995 Act is similar to that which an occupier in the North would owe to a visitor. The duty is "to take such care as is reasonable in all the circumstances ... to ensure that a visitor to the premises does not suffer any injury or damage by reason of any danger existing thereon". The duty is qualified however by two factors; the care which the visitor may reasonably be expected to take for his or her own safety and, if the visitor is accompanied, the supervision which that other person might reasonably be expected to exercise over the visitor's activities. Both of these are factors which a court in Northern Ireland, in having regard to all the circumstances, would also no-doubt take into account. But they are not specifically referred to as such in the NI legislation.

The duty of care which an occupier in the Republic owes to a recreational user or a trespasser, however, is simply:

- not to injure the person or damage the person's property intentionally; and
- not to act with reckless disregard for the person or the person's property.

This is clearly somewhat less than the equivalent duty in Northern Ireland, particularly where the recreational user has sought the occupier's permission (and would therefore, in the North, continue to be regarded as a 'visitor').

In addition, the legislation specifies that, in determining whether the occupier has in fact acted with "reckless disregard", regard shall be had to all the circumstances including:

- whether the occupier knew or could have reasonably believed that;
 - a danger existed on the premises;
 - the person was on the premises;
 - the person was likely to go near the danger;
- whether the occupier could reasonably have been expected to provide protection;
- the burden on the occupier of eliminating the danger or protecting against it, including the difficulty, expense and practicality of doing so and the degree of the danger;
- the character of the premises and desirability of maintaining a tradition of open access for recreational activities;
- the conduct of the person and the care which he or she may reasonably be expected to take for his or her own safety;
- the nature of any warnings that were given; and,
- if the person was accompanied, the supervision which that other person might reasonably have been expected to exercise over his or her activities.

4.7 Advantages of the Republic's legislation for occupiers

The first three of the nine factors which a court in the Republic must take into account are similar to the criteria in NI legislation which a court would apply in deciding whether an occupier has a duty of care towards a trespasser. The remaining six, although not specifically referred to in the NI legislation, are nevertheless largely all matters that a court, in having regard to all the circumstances, could normally be expected to take into account. (The exception is possibly the question of the desirability of maintaining a tradition of access.)

To this extent, the advantages to the occupier of the ROI legislation over the NI legislation are possibly more apparent than real. But the 1995 Act does have one major advantage from the occupiers' point of view. It is that anyone to whom the occupier chooses to give permission to use the land, without charge, remains a 'recreational user' for the purposes of liability. The occupier therefore continues to have no greater degree of liability towards that person than the minimal duty owed towards a trespasser. In the North, a person to whom permission is similarly given then becomes a 'visitor' and will be owed a correspondingly greater duty of care.

Two other benefits are, first, that the duty towards a recreational user or trespasser is more clearly expressed in the ROI legislation and easier for the occupier to understand than the equivalent duty in NI. Secondly, the occupier has also the psychological reassurance of being able to see clearly how the courts would deal with a claim for liability and the series of tests that would need to be satisfied for a claim to succeed. In the same way, it is possible that this may also help to discourage any speculative claims from being made.

4.8 Duty towards any person committing an offence

A further specific provision in the ROI's 1995 Act is that the occupier shall not be liable for acting with reckless disregard towards any person who is on the occupier's property for the purpose of committing an offence, or who commits an offence while there, unless a court decides otherwise in the interests of justice.

A number of those at the discussion workshops said they considered that this provision, too, was valuable in providing clarification and reassurance to the occupiers. It was therefore something that they would welcome being incorporated into Northern Ireland legislation, albeit that it may be unnecessary, in strict legal terms, to do so.

4.9 Provision of warning notices

One of the factors to be taken into account in deciding whether an occupier has acted with reckless disregard is the nature of any warnings given. The Irish Farmers' Association/FBD *Guide to the Occupiers' Liability Act 1995* draws attention to the protection that "properly worded signs, displayed prominently" can give against legal action by a trespasser or recreational user and suggests the text for a number of brightly coloured warning signs, such as "DANGER - Farm Machinery Present - DO NOT ENTER" and "DANGER - These Lands Contain Farm Animals - DO NOT APPROACH." Such signs have subsequently been widely distributed, free of charge, by agricultural suppliers and are now a highly visible feature in many areas of the Republic's countryside.

Further signs, often strongly deterring countryside users, have arisen as an unintended consequence of the provision in the Act which enables the occupier to further restrict, modify, or exclude his or her duty towards a visitor where it is reasonable to do so, including

by putting up a notice. For example, a common notice is one stating simply “No visitors”. Technically, it is claimed, the occupier’s intention is to make it clear that anyone on the land is to be treated in law as a recreational user or a trespasser rather than as a visitor. But in practice, such notices are likely to read by most people as discouraging access in any circumstances.

In a subsequent newsletter¹ the FA qualified their earlier advice by stating that “Warning signs should only be necessary where a danger exists on property which a landowner alone knows of and which he wishes to bring to the attention of entrants. It should not be necessary for all farmers and property owners to erect signs, particularly where such signs fail to warn of specific dangers and may appear to be unwelcoming and offensive.” Nevertheless, the large number of prominent signs was comments on at a number of the workshops, both in terms of their visual intrusion in sensitive landscapes and the discouragement they give to any visitors. In adopting the ROI legislation as a model, it would be important to avoid similar consequences arising in Northern Ireland.

¹ *IFA Industry and Environment News*, Issue No. 2, October 1995.

5. CONCLUSIONS

The discussions at the initial workshops and meetings between the wide range of interests represented on the Countryside Access and Activities Network have shown there to be a consensus in favour of changing the current legislation on occupiers' liability in so far as it relates to the informal use of the Northern Ireland countryside for recreation. The broad range of interests represented at the initial public meeting in September 2000 and the two further public meetings in February 2001 also universally endorsed the need for such a change.

Underlying this consensus is a recognition that much of the access to the countryside which takes place throughout Northern Ireland relies on the informal acquiescence or tolerance of the occupier, or simply amounts to trespass. It is unfair and unreasonable that the occupier, in these circumstances, should then have a duty of care towards those who have come onto his land in this way. To say that the duty of care is only a minimal one given the factors that a court would take into account is to miss the point - there should in fact be no duty at all falling on the occupier beyond that of not acting maliciously, wilfully or recklessly towards anyone known to be on the premises. It is this principle which should underlie the reform of the legislation on Occupiers' Liability in Northern Ireland.

5.1 Justification for reform of the legislation

The justification for reforming the legislation lies not in the fact that it is giving rise to an excessive number of liability claims, is being misused to threaten unwarranted or vexatious claims, or is being interpreted unreasonably by the courts, none of which appears to be the case in practice. Nor should the legislation be changed simply because many occupiers are uncertain of their legal position and the legislation as a whole is widely misunderstood - although these are problems which do exist and which must also be addressed separately. Rather the justification for changing the legislation lies instead in the fact the current provisions on occupiers' liability are out of step with the underlying traditions and culture of society across Northern Ireland in so far as they relate to the recreational use of the countryside. In particular, the legislation fails in three crucial respects:

- the legislation does not reflect in law the basis on which those who wish to use the Northern Ireland countryside for recreation seek to do so;
- it does not provide a framework within which farmers and landowners can feel comfortable in allowing recreational use of their land by the public to take place;
- it undermines rather than supports the practical efforts being made to secure a wider range of informal opportunities for people to enjoy the Northern Ireland countryside.

Unlike other areas of the UK, there is a strong tradition among walking groups and others wishing to use the countryside for recreation of first seeking permission from the occupier - permission which, in turn, is almost invariably freely given. Even where permission has not been sought in this way, those walking in the Northern Ireland countryside will often stop to talk to any farmer they encounter and may, as a matter of common courtesy, seek permission to proceed. It was clear from the workshop discussions that all sides are agreed that it is there should be no question that the occupier, as a result of giving permission in this way, should then be subject to a duty of care towards the user as a visitor. Nor should the occupier otherwise be expected to have to refuse permission or otherwise give a legalistic or obsequious answer in order to protect himself.

Elsewhere in Northern Ireland, public access to the countryside for recreation relies simply on trespass by members of the public which the owners have either been willing to tolerate or have effectively been unable to prevent. Here too, there should be no question of the occupier then being liable towards those who have come onto the land in this way, other than at a very basic level of not acting maliciously, wilfully or with recklessly disregard.

5.2 The changes required

The recreational user statutes widely incorporated into law throughout the USA and the Republic of Ireland's Occupiers' Liability Act 1995 (itself a development of the US model) provide models of the legislative changes that are needed in Northern Ireland. Three key changes in particular are required:

- A third category of entrant - that of a 'recreational user' or 'recreational entrant'¹- should be established, being a person who is on the occupier's land, primarily without charge, for the purposes of engaging in a recreational activity;
- The occupier's duty towards a recreational user or entrant should be the same as that towards a trespasser;
- That duty should be limited to a duty not intentionally to injure the person or damage the person's property, nor act with 'reckless disregard' for the person or his or her property.

The occupier's duty of care towards anyone who remains 'a visitor' under these new provisions would be unchanged.

5.3 Definitions to be used and land to which the provisions should apply

The simpler definitions of 'recreational activity' and 'recreational user' in the ROI legislation are generally to be preferred to the more all-embracing definitions commonly found in the US legislative codes, albeit that this puts more reliance on the courts to determine borderline cases. The definitions are;

"recreational activity" means any recreational activity conducted, whether alone or with others, in the open air (including any sporting activity), scientific research and nature

¹ The term 'recreational user' is employed both in the ROI and American legislation. In commenting on the Consultant's interim recommendations, however, the Ulster Farmers' Union said the felt that 'user' could sometimes be taken to imply that the person had permission to be on the land, and that for this reason they would prefer instead the term 'recreational entrant'. It is therefore this term which is used in the final recommendations to the Network.

study so conducted, exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archaeological or scientific importance.

“recreational user” means an entrant who, with or without the occupier’s permission or at the occupier’s implied invitation, is present on premises without a charge (other than a reasonable charge in respect of the cost of providing vehicle parking facilities) being imposed for the purposes of engaging in a recreational activity.....¹

In the same way, while the US statutes vary widely in what constitutes “premises”, the simple, broad definition used in the ROI legislation would seem to be preferable in a Northern Ireland context. This makes no distinction between urban and rural areas, nor does it distinguish between developed land, enclosed farmland or open land. The provisions therefore apply equally to all land, regardless of its type or situation.

5.4 ‘No obligations on giving consent’ clause

A feature of the US statutes widely commented on in the discussion workshops is the provision that, in giving consent for the recreational use of the land, the occupier assumes no responsibility for the condition of the land or anything on the land. Nor does consent imply that the land is fit for the purposes the user intends to make of it, or mean that the occupier is responsible in any way for the actions of the person to whom consent was given. The occupier is therefore under no obligation to inspect the property to discover hidden dangers or provide any assurances of safety to those users.

These provisions are not specifically included in the ROI legislation, possibly because they were not considered to be necessary; in providing that the occupier has no duty towards a recreational user other than not to wilfully or maliciously cause injury or act with reckless disregard, it follows that any consent which the occupier may give to a recreational user must automatically be without any obligation on the part of the occupier. Nevertheless, the inclusion of specific provisions of this kind in Northern Ireland legislation, based on the US model, would clearly be welcomed by the farming community. Not only would this then put the matter absolutely beyond doubt; it would allow the occupier’s position to be very clearly spelt out in any guidance and provide important psychological reassurance.

5.5 Specifying the factors a court must take into account

The same can be said of the provisions in the ROI legislation which prescribe the matters which a court must take into account in deciding whether an occupier has acted with ‘reckless disregard’. At the one level, it can be argued that this is largely unnecessary in Northern Ireland given that the matters prescribed are (with one or two exceptions) those which a court, in having regard to all the circumstances, would already routinely take into account. Nevertheless, setting out the matters on the face of the legislation would provide both practical and psychological reassurance. Not only can the occupier then be sure that these are matters which the court *must* take into account, he or she can also see clearly all of the tests that must be satisfied before an adverse claim can succeed.

Precisely which matters a court in Northern Ireland should be directed to have regard to may

¹ ‘Recreational user’ also includes anyone visiting a national monument free of charge. But it excludes the occupier’s family, those whom the occupier or a family member have expressly invited onto the land and those who are present “for social reasons connected with the occupier”.

need to be the subject of further consultations as the details of amending legislation are worked up. The current study has shown, however, that it is widely accepted that it would be essential to include:

- the character of the premises together with the nature and degree of any danger which may exist and the burden and practicality of either removing the danger or protecting people against it;
- the risks inherent in the recreational activity that the injured person was engaged in;
- the conduct of the person and the degree of care he or she could have been expected to take for his or her own safety;
- if the injured person was accompanied, the supervision which that other person might reasonably have been expected to exercise over his or her activities.

In discussions, the Ulster Farmers' Union has suggested that the presence of any farm animals should also be taken into account by the courts as something that the user should routinely expect to encounter in the countryside.

There would also be merit in requiring a court to take into account any relevant guidance published by a Government Department or Agency, following the lead adopted in England and Wales in relation to access to open country land as discussed in section 4.2 above.

5.6 Provisions on charging for access and access-related income

The occupier's immunity from liability under both the US and ROI models is intended to apply only where recreational access takes place free of charge. There are, however, some minor exceptions to this which could also sensibly be mirrored in any NI provisions.

The US codes commonly exclude any fees that may be derived from leasing the land to a public agency. In the NI context, the parallel would be to exclude any income that may be derived in return for permitting access under any agri-environment schemes or as a result of any agreements entered into with the district council or a community group. A few states also allow the occupier to derive small amounts of income (either from charging for a specific activity or generally) without loss of immunity, while the ROI legislation allows a 'reasonable charge' to be made in return for providing vehicle parking.

To restrict the income that may be received to that from car parking (or any other specific services which are provided) seems to introduce an unnecessary complication. It also begs the question of what is a 'reasonable charge'. But it is clearly sensible that the occupier should not forfeit his or her immunity as a consequence of receiving minor amounts of income, whether from providing a service to recreational users or in accepting any token payments (such as those which may be offered by a user group as a gratuity for permitting access to a particular feature).

The Consultant's interim report therefore proposed that in Northern Ireland a simple monetary limit be set for the income which may be derived from recreational users without affecting the occupier's liability. In subsequent discussions, the Ulster Farmers' Union said that they accept this principle but that the limit suggested, of £500 per annum, was too low and that a more realistic figure would be in the order of £2,000 to £2,500. The Union also believed that a way should be found of indexing the sum to inflation so that it could be

automatically revalued. (One way of doing this might be to equate the sum to the appropriate level on the standard scale of fines under the Criminal Justice Act and which are re-valued from time to time to keep pace with inflation.)

5.7 Liability towards users on a right of way

It was noted in section 2 that the current legislation on occupiers' liability does not apply to public rights of way. All such claims therefore continue to be determined under common law, with the courts traditionally taking the view that anyone using a right of way must be prepared to take the condition of the path as they find it. This approach is rooted in the court's belief that anyone who is public spirited enough to dedicate a right of way to the public should not then suffer the 'penalty' of being responsible either for the condition of the path or the safety of path users.

It can of course be argued that the same consideration of 'fairness' should apply equally to all informal recreational use of the countryside - that any occupier who is willing to permit his or her land to be so used, or whose land is used without permission, should not then suffer the 'penalty' of having a duty of care towards the recreational entrant or trespasser. This is another strong argument for changing the law on the basis of the United States' or Republic of Ireland's model.

Changing the legislation as proposed, however, would overcome the need to distinguish between recreational entrants and trespassers on the one hand and those using a public right of way on the other. Given the very limited duty of care, the new legislation could reasonably apply instead to all countryside users. This in turn would have the advantage of simplifying the advice that needs to be given, both to owners and occupiers and to all recreational users. It would also overcome the possible need to determine whether a particular incident took place on or off the line of a right of way, and negate any speculative legal challenges that might otherwise be made in relation to cases involving rights of way (such as those previously mounted in the Brady and McGeowan cases) in the hope of persuading the courts to vary the existing precedents or to find, exceptionally, in favour of the plaintiff.

The Ulster Federation of Rambling Clubs is concerned, however, that extending the new legislation on occupiers' liability to public rights of way could possibly have wider, unintended consequences. The Federation has therefore asked that it be made clear on the face of any amending legislation that such a change does not affect the underlying legal principles governing the establishment of public rights of way at common law, their permanence, or the public's rights to use and enjoy all rights of way as highways.

5.8 The on-going role of CAAN

Despite the prominence given to the issue of occupiers' liability over recent years, it was clear both from the initial workshops and the three public meetings that this remains an emotive issue and one about which there continues to be wide misunderstanding. Discussion of the subject (even amongst professionals) is still too often dominated by an exaggerated idea of what the occupier's current duty of care means in practice, and unsubstantiated fears about the predisposition of countryside users to make or threaten liability claims and the way in which any such claims would be treated by the courts.

The lessons to be drawn from American studies also suggest that simply making legislative changes so as resolve the current concerns is not in itself enough. There needs at the same time to be a sustained programme of information and advice, to de-mystify the issue and

overcome the persistent, deep-seated concerns about occupiers' liability that exist throughout the farming community. In Northern Ireland, any such information campaign should, ideally, be part of a wider initiative which is able to provide a range of information and advice to address the spectrum of concerns which exist about any greater recreational access to the countryside.

The public meeting together with the wider consultations on the Consultant's draft recommendations and publication of the interim report may, in themselves, have helped to generate a more objective understanding of the current position. The presentation of the Network's final recommendations to the Department and the publicity that will generate will also provide a further opportunity to explain the position and put the farming community's concerns into context. But making the legislative changes that are now being asked for will inevitably take some time. It is essential in the meantime that the Network members continue to play an active role and that nothing is done which could lead to further confusion and uncertainty, or which might reduce in any way the existing access opportunities.

The way in which the Network's proposals are to be presented and the on-going role the Network should play in continuing to promote the case for legislative reforms are therefore both matters that should be considered in more detail, once the Network has agreed the final recommendations that are to be made to the Department.

At that time the Network may also wish to consider the further strategic or practical roles that it could play in developing a wider climate of understanding and cooperation among all the interests involved. Two ideas in particular have emerged from the initial meetings, as noted in section 2.8, which reflect the Network's unique position, and thus the special role that it might play beyond that which is open to the Department, local authorities, or individual Network members. These are the possible development and promotion of some form of concordat between all the countryside users on the one hand and the representatives of the farming community on the other, particularly to emphasise that all users must primarily take responsibility for their own safety; and that of fostering a one-to-one advisory service which would enable farmers and landowners to have access, free of charge, to impartial, professional advice on issues relating to public access.

6. RECOMMENDATIONS

The discussions at the initial workshops and meetings, together with the further round of consultation and discussions in January and February 2001 and consideration of the other issues set out in this report lead to the following recommendations to the NI Countryside Access and Activities Network.

6.1 Proposals for legislative reform

A. Justification for seeking reform of the legislation

The Network should recommend to the Department of the Environment that the current legislation governing occupiers' liability in Northern Ireland should be reformed at the earliest opportunity. The justification for doing so lies in the fact that the current legislation:

- fails to reflect in law the basis on which those who wish to use the Northern Ireland countryside for recreation seek to do so;
- does not provide a framework within which farmers and landowners can feel comfortable in allowing recreational use of their land by the public to take place;
- undermines rather than supports the practical efforts being made to secure a wider range of informal opportunities for people to enjoy the Northern Ireland countryside.

In putting forward their recommendations, the Network should also emphasis the wide consensus that has been established amongst all the bodies that are concerned with informal countryside recreation throughout Northern Ireland and importance which they attach to the need for early legislative reform.

B. Key changes

The reforms should be based on the recreational use statutes widely adopted throughout the United States of America and on the Republic of Ireland's Occupiers' Liability Act 1995 (and which is itself a development of the American statutes).

Three key changes are required:

- A third category of entrant - that of a 'recreational entrant' - should be established, being a person who is on the occupier's land for the purposes of engaging in a recreational activity;
- The occupier's duty towards a recreational entrant should be the same as that towards a trespasser;
- That duty should be limited to a duty not intentionally to injure the person or damage the person's property, nor act with reckless disregard for the person or his or her property.

C. Definitions and land to which the new provisions should apply

The definition of 'recreational entrant' and 'recreational activity' should be based on those set out at clause 1 of the Republic's Occupiers' Liability 1995 Act.

However the definition of 'recreational entrant' should contain the additional qualifications that:

- the user may incur a reasonable charge for the provision of car parking or other services connected with the recreational activity provided by the occupier;
- the maximum income received by the occupier from the provision of any such services (including car parking) shall not exceed an initial limit of £2,500 in any year;
- no account shall be taken in this respect of any grants, compensation or other payments that the occupier may receive in return for permitting recreational activity to take place on the land in accordance with an agreement entered into with a government department, local authority or community group for the area.

The provisions should apply to all premises (as does the existing legislation on occupiers' liability). No distinction should be drawn between premises situated in urban or rural areas, or between developed land, enclosed farmland and open, uncultivated land.

In formulating these provisions, a way should be found of index-linking the sum prescribed as the maximum income so that it can automatically or periodically be revised in line with inflation.

D. Further qualifications on the occupiers' duty

The legislation should separately and specifically provide that:

- the occupier has no duty to keep his premises safe for entry or use by any person for the purposes of engaging in a recreational activity;
- an owner, occupier or lessee of any premises who gives permission to another to pursue such activities does not thereby (1) extend any assurance that the premises are safe for such purposes (2) have any duty of care towards the person to whom permission is granted, other than as towards a recreational entrant.

E. Specifying the factors a court must take into account

The legislation should specify that, in determining whether an occupier has acted with reckless disregard towards a recreational entrant or a trespasser, regard shall be had to all the circumstances of the case including:

- the character of the premises;
- the nature and degree of any danger which may exist on the premises (including the presence of any farm animals and the carrying-out of all normal farming and land management operations) and the burden on the occupier and practicality of either

removing the danger or protecting people against it;

- the risks inherent in the recreational activity that the injured person was engaged in;
- the conduct of the person and the degree of care he or she could reasonably have been expected to take for his or her own safety;
- any relevant guidance that may have been given to users of the countryside by a Government Department or Agency;
- if the injured person was accompanied, the supervision which that other person might reasonably have been expected to exercise over his or her activities.

The legislation shall also specify that the occupier shall not be liable for acting with reckless disregard towards any person who is on the occupier's property for the purpose of committing an offence, or who commits an offence while there, unless a court decides otherwise in the interests of justice.

F. Warning notices

While legislation should continue to provide that an occupier may, where appropriate, meet the duty of care by putting up a warning notice, the Department should be asked to ensure that in drafting this provision care is taken so as not to encourage the erection of a plethora of unnecessary signs.

G. Liability towards users on a right of way

The Network should recommend that the minimal duty of care that an occupier will have under these revised arrangements should also extend to any users on a public right of way which may cross the occupiers' land. Doing so will enable clear, consistent advice to be given (to both owners and occupiers and to all countryside users). It will also negate any complex legal arguments that might otherwise be made about the differences between the occupiers' position under common law and statute law, and overcome the possible need to decide exactly where, on the occupiers' land, an incident took place.

In extending occupiers' liability under statute law to public rights of way, however, it should be made clear on the face of the legislation that this does not affect in any way the establishment of rights of way at common law, their perpetuity, or the public's rights to use and enjoy all rights of way as a highway in law.

6.2 Further roles of the Countryside Access and Activities Network

In considering the final recommendations that are to be made to the Department, the Network should also give consideration to:

- the way in which the Network's proposals are to be presented, in particular to ensure that the publicity which they receive adds to a better understanding of the present position and does not lead to further confusion or threaten existing access arrangements in any way;
- the on-going role the Network should play, having made its recommendations, in continuing to promote the case for legislative reforms;
- the further strategic or practical roles that the Network might play in developing understanding and cooperation among all the interests involved in countryside recreation, particular those roles which reflect the Network's unique position and which are not open to individual member bodies.

The possible roles to be considered in this context should include;

- the development and promotion of some form of concordat between the countryside user bodies and the representatives of the farming community, particularly to emphasise that all users must take primarily responsibility for their own safety;
- the feasibility of fostering a one-to-one advisory service giving farmers and landowners free access to independent, professional advice on access related issues;
- the additional roles which the Network might have in helping to monitor insurance claims relating to liability cases or in resolving the practical concerns about the way any such cases are dealt with.

Roy Hickey

Consultant on Countryside Access and Rights of Way

3rd May 2001

Appendix A

CONSULTATION MEETINGS AND WORKSHOPS

Initial consultation meetings or workshops were held between 4th and 8th September 2000 with the following groups:

Monday, 4th September

Outdoor learning Group
Sports Forum - Land, Air and Water

Tuesday 5th September

Landowners/Land managers
Countryside Access and Activities Network

Wednesday 6th September

NI Countryside Officers' Forum
Countryside Access Liaison Group

Thursday 7th September

Public meeting, Craigavon Civic Centre

Friday 8th September

Area Based Management Forum; RDC/RCN
Meeting with Directors of Countryside Recreation NI

WRITTEN RESPONSES

Following these initial meetings, further written comments were received from:

Belfast Hills Committee
Belfast Hills Working Group, UFU
Department of Agriculture and Rural Development
Mourne Heritage Trust
Ulster Farmers' Union

FURTHER MEETINGS AND WRITTEN RESPONSES

Following the publication and wide distribution by the Network in January 2001 of a summary of the Consultant's interim report and draft recommendations, further meetings were held as follows:

Tuesday 13th February

Public meeting, Cookstown

Wednesday 14th February

Working meeting with the Ulster Farmers' Union, Belfast

Public meeting, House of Sport, Belfast.

Written comments were also received from the Ulster Federation of Rambling Clubs on the issue of extending occupiers' liability towards users on public rights of way.

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