National Access Forum - May 2017

Paper on Occupiers' liability – Case-law update - 2017

Purpose

The attached paper presents information on recent court cases, intended for insertion into an updated version of the SNH "Brief Guide to Occupiers' Legal Liabilities in Scotland", first published in 2005.

Action

Members are invited to note the contents of the paper, and discuss as they see fit.

Background

The "Brief Guide to Occupiers' Legal Liabilities in Scotland" has proved a useful and well-regarded publication. In the years since it was published there has been a variety of other court cases and judgements. These throw useful further light on the topics concerned, while largely reinforcing the legal principles and the consistency of application which were evident when published. The attached paper sets out the relevant updates, which it is intended to insert into a revised document in the near future.

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Occupiers' liability – Case-law update 2017 Draft

"A Brief Guide to Occupiers' Legal Liabilities in Scotland – in relation to Public Outdoor Access" was published by SNH in 2005, and is available at the SNH website at http://www.snh.gov.uk/publications-data-and-research/publications/search-the-catalogue/publication-detail/?id=390

There have been a number of relevant cases since then, and SNH is proposing to update the guide by inserting into Part Two, in the same format, brief details of the most relevant of these cases and other references, as follows –

Part Two: Indicators from Case Law

Section 1 – Fencing of hazards

Case Issue – fencing the natural hazard of a cliff-top path
Case title and date – Fegan v Highland Regional Council 2007 – Court of Session
Case Outline – a person was injured when she fell from near a seat and the path adjacent to steep cliffs near Thurso. The appeal court agreed with the sheriff's finding that the circumstances of the location do not amount to a special risk or danger requiring the occupier to take precautions such as the erection of fencing. Also that, even apart from considerations on the expense of fencing, and of how many people would find fencing intrusive and objectionable, the question was one of degree and common sense, and no unusual or special features required the occupier to take precautions such as the erection of fencing.

Case Issue - fencing beside a burn in a park
Case title and date – Trueman v Aberdeenshire Council - 2007 - Aberdeen Sherriff Ct
Case Outline – a person was injured when she tripped on a low wire of a partial fence while taking a short cut through the park at night on Hogmanay 2000. The council had erected a light demarcation fence along the top of a burnside bank and planted area, which had been vandalised, leaving a bottom wire near the ground on which she tripped and fell. The court found that once the fence had been constructed the occupier had a duty to maintain it in reasonable condition, but also that there was contributory negligence from the person by failing to keep a proper lookout and control of her movements, which was judged as being 80% responsible for the accident, with damages awarded accordingly.

Section 2 – Signs and notices on hazards / obvious hazards

Case issue – safety notices and inspections at natural visitor site
Case title and date – Ferrari v National Trust N Ireland – 2004 - High Court NI
Case outline – at the Giants Gate, near the Giant's Causeway world heritage site, a person was injured as he fell when part of a basalt column on which he stood appeared to have given way. The judgement quoted extensively from the Tomlinson case. It found that there was no foreseeable risk nor obvious danger, and there had been no fall of basalt columns in the previous forty years, so the accident was due to the state of the premises with no breach of any duty of care. However, now that this accident has occurred, it now puts an onus on the occupier to set up regular inspections, and remedial steps if needed, but those inspections would just be for the area near this accident. It did not mean that any warning notices or barriers were needed at or near the location, as most dangers are self-evident.

Section 3 - Inspections / Appropriate systems / Occupiers' knowledge

Case issue – Inspection regime for mature trees
Case title and date – Bowen and others v National Trust - 2011 – High Court London
Case outline - an 11-year old boy was killed and three other children injured when a large branch fell from a 180-year old tree at Felbrigg Hall in Norfolk. The path where the accident occurred was graded a medium risk, but the National Trust recognised its duty of care by having a system in place for the inspection of trees, and this beech tree was inspected at least every two years. It was accepted that the NT had clear and robust policies, its inspectors used all the care expected of reasonably competent persons doing their job, and they had been given adequate training and instruction on how to approach their task. "If the bare possibility of a failure of a tree branch in a medium risk zone is enough to trigger tagging and remedial works, the bar would be set at an unreasonably low level." It was found that the NT was not negligent nor in breach of its duty in respect of this tragedy.

Other similar cases - Caminer v Northern and London Investment Trust ltd 1951: Found that the tree owner is not expected to guarantee that the tree is safe. The owner has to take only reasonable care such as could be expected of "the reasonable and prudent landowner".

Micklewright v Surrey County Council; Court of Appeal London 2011: Fatal injury from a fallen oak branch with some decay. Appeal judgement agreed with the judge, who "concluded (and this is not capable of challenge) that the type of inspection required was "a quick visual inspection carried out by a person with a working knowledge of trees as defined by the HSE", and the appeal was dismissed, with regrets expressed. (see references below).

Section 6 – Injury while using access rights

6.2 Case issue - Duty of care for people on a constructed path
Case title – Leonard v Loch Lomond and Trossachs NPA – 2014 Court of Session
Case outline – a person was injured when he fell off the West Highland Way path and down a bank onto a road, and it was claimed the path steps were uneven and with roots and other tripping hazards, with no barrier preventing the fall. The judgement referenced the *Tomlinson* case and *Fegan* case, and decided that the path being a man-made feature rather than a natural one made no difference, and it was a path constructed to accepted and normal standard. It was constructed to provide greater safety for users with better grip and stability than the mother earth, and there was no history of complaints or accidents. The *Graham* case was cited in finding the path to be a long-standing artificial feature which was neither concealed nor unusual, with no special hazard, and had become an ordinary feature of the landscape, over which the NPA owed no duty of care to people.
The judgement specifically goes further, to "hold that it is not a requirement that the artificial feature be well established or long-standing" for the principles of previous case law to apply. Theefore even if "an accident happened a week after an obvious artificial feature which became part of the landscape (such as a pond, swimming pool or path) had been constructed", there is no reason for the same principles not to apply. It is accepted that any path may by its nature present some dangers and "risk of tripping or slipping, but that is a risk which those venturing upon the hill must be taken to have accepted." " It would be contrary to common sense, and therefore not sound law, to expect (occupiers) to provide protection to members of the public (by means of a handrail or barrier or anything else) against such an obvious danger".

Section 7 – Voluntary acceptance of risks

7.3 Case issue – Duty of care for people on a structure (boardwalk)
Case title – Wall v National Parks and Wildlife Service – 2017 – High Court Dublin
Case outline - a person was hurt when she tripped and fell on a boardwalk on the Wicklow Way national route in the Wicklow National Park. The boardwalk was made of re-cycled railway sleepers, and the trip was apparently caused on one of the old holes in the sleeper. The Wicklow Way is inspected by the National Trails Office with a trail inspection every second year, and is run by a partnership of bodies. The judgement referenced the *Tomlinson* and the *Leonard* judgements, and certain other highways cases.
It also raises the principle of **'social utility'**, saying "it is well-established that conduct which is of high social utility will not be assessed as onerously as that of low social utility". It refers to judgements stating that it is important that the law should not impose unreasonably high standards, otherwise scarce resources would be diverted from more urgent needs. There needs to be a sensible balance between private and public interests, where "the risk was of a low order and the cost of remedying such minor defects all over the country would be enormous".
The judgement concludes "Because of the vigilance expected from hill walkers, walking on moderate mountain trails, and the application of the legal principle that the standard of care has to be adapted to the conditions, the social utility of the provision of the boardwalk, the isolated location of the same, I do not hold that the defendant was negligent in not filling in the indentations or replacing the sleepers with new sleepers, and will accordingly allow the appeal in full."

References and Sources of advice - Additional references –

Health and Safety Executive - 'Cattle and Public access in Scotland" – HSE Agriculture Information sheet no.17 http://www.hse.gov.uk/pubns/ais17s.pdf

Health and Safety Executive – "Management of the risk from falling trees" guidance for HSE inspectors and local authority enforcement officers" 2013
http://www.hse.gov.uk/foi/internalops/sims/ag_food/010705.htm

National Tree Safety Group - "Common sense risk management of trees - guidance on trees and public safety in the UK for owners, managers and advisers", FC Dec 2011. Summary version at - https://www.forestry.gov.uk/safetreemanagement