

# **Opinion provided by Andrew Upton, Harper Macleod LLP to NatureScot on 10 May 2024 regarding the legal position on liability for third party promotion of paths**

## **Liability of Landowners to Access Takers**

As I understand it, concern has arisen in relation to the publication and promotion of paths and routes for the exercise of Access Rights under the Land Reform (Scotland) Act 2003. Specifically, promotion of unauthorised (which is to say, route which have not been approved by landowners nor represented by landowners as being suitable for the exercise of access rights) routes by social media groups and mobile phone apps.

You have asked me to provide a brief opinion on the effect, if any, of the publication and promotion of such unauthorised routes on the risk of liability of landowners in the event of an accident.

## **No Effect**

In short, it is my view that there is no increase in liability for landowners arising out of promotion of unauthorised routes. Section 5(2) of the 2003 Act provides that “The extent of the duty of care owed by an occupier of land to another person present on the land is not, subject to section 22(4) below, affected by this Part of this Act or by its operation”. That means that the existence of Access Rights over land, whether authorised or unauthorised, promoted or not, does not have an effect on the extent of any duty of care owed to access takers.

What the promotion activity may do is increase foot traffic to the area. An increase in traffic necessarily increases the risk of injury and claim. Against that background, it is useful to understand the extent of a landowner’s liability.

## **Occupier’s Liability**

The common law rules relating to the duty of care to be shown by a person occupying or having control of land or other premises were replaced by the Occupiers’ Liability (Scotland) Act 1960.

The extent of occupier’s duty is set out in section 2 of the 1960 Act as follows:-

“(1) The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

(2) Nothing in the foregoing subsection shall relieve an occupier of premises of any duty to show in any particular case any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

(3) Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.”

Read shortly, the 1960 Act places a duty of reasonable care on occupiers of land to make sure that persons entering onto their land do not come to harm. That duty is owed whether the person attends by invitation or not, though what amounts to reasonable care in each case may differ.

What is required to meet the duty of reasonable care will depend on the circumstances. In *Leonard v Loch Lomond and the Trossachs National Park Authority*, 2016 S.C.L.R. 102, a young boy ran ahead of his parents on a track through the national park. Somehow (it was not established exactly how), the boy fell from the track down a steep bank to his injury. The Court determined that there is no duty on an occupier of land to warn or fence against obvious dangers. The Court accepted that there is always an inherent level of danger associated with being in the open environment.

The decision in *Leonard* is not a complete answer. There may be times where the known risk associated with being on the land has increased, for example following flooding or storm events that have destabilised trees or structures, which an occupier may be expected to warn of. The safest option where a specific known danger exists will always be to erect signage warning of the danger.

In fact, as a generality, it would be advisable for landowners where Access Rights are being exercised to erect clear signage at multiple points advising that the open environment carries inherent risk, that the routes are not maintained for access, and that access takers proceed at their own risk. That ought to provide a stateable defence under section 2(3) of the 1960 Act.

## **Dangerous Land Management Activities**

It should be kept in mind that the publication of a route by a third party does not mean that access rights are exercisable over that route. The question of whether the land is exempt from Access Rights, or whether Access Rights may be restricted for some other purpose, will still have to be addressed.

Accordingly, where the unauthorised route that is promoted would interfere with legitimate land management, or includes land which is exempt from Access Rights, landowners ought to feel empowered to take such steps as are necessary to use and manage their land responsibly, including excluding access where that is necessary. Where access is clearly excluded for a particular purpose, and a member of the public

takes access anyway, that will not be a responsible exercise of access rights. It also seems to me that an occupier of land is unlikely to be liable for injury to a person who has taken access to a place that they were expressly excluded from. It is not an answer for the injured party to say that a third party, without any right, title or interest to do so, directed them to the route. The apps set out a recommendation; not a right.

I hope that this note is of assistance. If you require anything further then please let me know.

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