



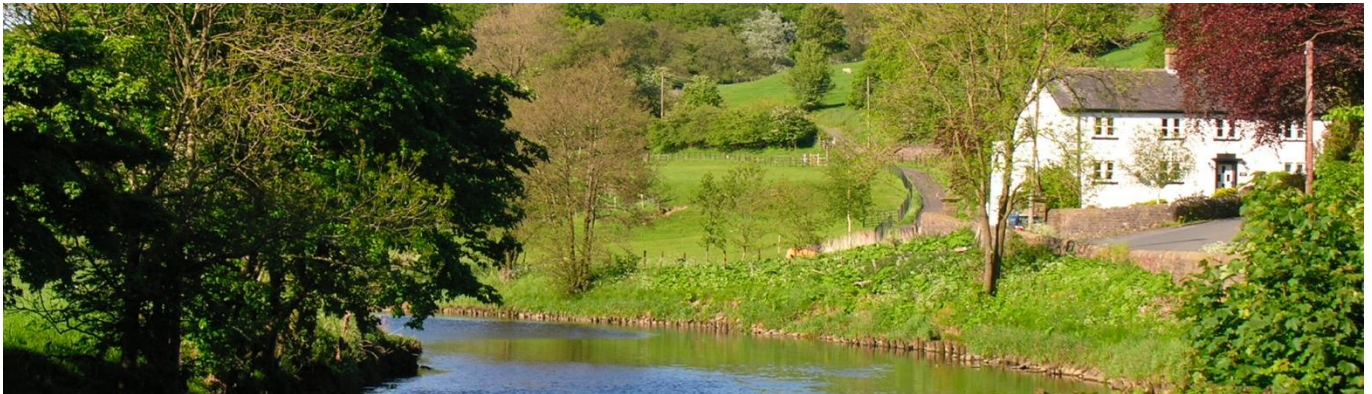
LEGAL

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REFERENCE

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# RIPARIAN OWNERS, RIVER AND ACCESS: WHAT YOU NEED TO KNOW



**(This guidance note replaces GN18-13 which should be deleted from your files)**

## 1. INTRODUCTION

For CLA members with interests in non-tidal rivers, repeated trespass by individuals in non-motorised craft paddling along the river and by individuals using their land to access the river are key concerns. Trespass impacts the flora and fauna, the experience of anglers, as well as privacy and property rights. Many members are worried about damage and liability, notably in the context of commentary from canoeing groups and individuals, which states – erroneously – that there is a general right of navigation for members of the public.

This Guidance Note explains the current legal position, assesses the strength of some of the claims that seek to change that position, and looks briefly at the issue of liability.

## 2. RIGHTS OF NAVIGATION ON TIDAL WATERCOURSES

In England and Wales there is *prima facie* (accepted as correct unless proved otherwise) a public right of navigation on tidal rivers. This is dependent on the rebuttable presumption (meaning the initial presumption can be defeated with evidence to the contrary) that the Crown owns the bed of the river up to the limit of the tidal reach, (i.e. the presumption that the soil of the foreshore and bed is waste of the kingdom which has not been granted).

However, there are exceptions to this as there are a number of instances throughout the country where the tidal riverbed is in private ownership. There is also an exception to this initial presumption of public navigation on waters subject to the flux and reflux of the tide; the strength of this initial presumption will depend on the nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a smaller stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it may be more difficult to suggest that it had ever been a public navigable channel. Members can contact the CLA's legal team to discuss this further if relevant to them.

## 3. RIGHTS OF NAVIGATION ON NON-TIDAL WATERCOURSES

The legal position is clear: **there is no general public right to navigate along non-tidal rivers in England and Wales**. This position has been confirmed repeatedly by no lesser authority than the House of Lords. Granting such general navigation rights would require primary legislation.

Beyond the limit of the tidal reach, the bed of a river is in private ownership, sometimes as a separate legal tract (for instance where it is owned by a fishing club) but more usually by the adjoining landowners each owning to the midway point of the riverbed. Those landowners are free to decide how to use their part of the river unless a public right of navigation exists. A right of navigation can be created by immemorial user or statutory authority such as a Navigation Act. It may also be brought about by express grant. It should be noted that the ability to achieve an express grant has been brought into question in the context of Scottish land law (for which the foundations of public rights of way and of navigation are very different to England and Wales) as a result of the case of *Wills' Trustees v. Cairngorm Canoeing and Sailing School Limited*<sup>1</sup>. There are other potential legal mechanisms for providing permanent public rights of access to an area including a river, again if this is something you are considering members can contact the CLA's legal department for further information.

In the absence of specific proof of such a right, those using the river without the landowner's permission would be trespassing.

There is clear legal authority in support of this approach culminating in the ruling of the House of Lords in *The Attorney-General ex rel. Yorkshire Trust v Brotherton*<sup>2</sup>. Whether or not there has been misinterpretation of ancient authorities, that is where the law currently stands on the matter.

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<sup>1</sup> [1976] S.C. (H.L.) 30

<sup>2</sup> [1992] 1 A.C. 425

## 4. INCIDENTAL RIGHTS

Even where a right of navigation is shown to exist along a stretch of non-tidal river, it does not generally include a right to moor or to access the river via the banks. The banks of a non-tidal river are the private property of the riparian<sup>3</sup> owners. If members of the public alight on privately owned land or access the river from it, they will be committing a trespass. The position is summed up by Lord Jauncey in *Brotherton*:

*“The public navigating do not pass over the bed of the river in the sense that they are in contact with it, rather do they pass through the flowing water. The soil acts merely as a container for the water and otherwise performs no function in relation to the passage. Indeed the public have no right to use the bed or banks of the river other than perhaps for anchoring in an emergency and for landing at a place where they are entitled so to do.”*

## 5. FISHING RIGHTS

Where no rights of navigation have been shown to exist, in addition to being a trespass against the owner, canoeing along that stretch may amount to an actionable interference with the right to fish the waters.

*Rawson v Peters*<sup>4</sup> confirmed that even though there were no anglers present at the time and no damage was shown to have been done, it was still possible to bring a claim for the unlawful interference with fishing rights where someone canoed over the area. Nominal damages were awarded and the owners of the fishing rights were given permission to apply for an injunction to prevent further trespass. The Court was willing to provide a remedy despite the claimant having no proprietary interest in the bed of the river, they relied on the *profit à prendre*<sup>5</sup> of fishing rights.

## 6. THE CANOEISTS' POSITION

A number of individuals campaigning for increased access over rivers have undertaken research that they believe shows a general public right of navigation. The key components of this claim are analysed below:

### 1. THE 1472 ACT FOR THE TAKING AWAY OF WEARS AND FISHGARTHES

This Act is often cited as evidence of such a general right of navigation. However, the Act was to enforce the removal of structures on the great rivers. It did not grant any public rights of navigation.

There is a section at the beginning of the Act that refers to navigation along rivers in general rather than to great rivers throughout the rest of the Act. It seeks to interpret what was thought to be the reasoning behind clause 33 (no longer in force) of the Magna Carta 1215 which states: “All fish-weirs shall be removed from the Thames, the Medway, and

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<sup>3</sup> Riparian rights refer to the collection of legal interests enjoyed by the owner of land on the bank of a natural watercourse. The rights of a riparian owner do not necessarily depend on ownership of the soil under a watercourse but may arise simply through ownership of land abutting the watercourse.

<sup>4</sup> [1973] EGD 259

<sup>5</sup> A “*profit à prendre*” is a right to take natural resources from another person’s land.

throughout the whole of England, except on the sea coast". According to the 1472 Act, the need for such a clause in the Magna Carta was twofold: firstly, to aid navigation and secondly to protect the fry of fish. It does not specify which rivers were thought to have navigation rights and which rivers needed their fish stocks protecting.

The 1472 Act concerns itself with "great rivers" not rivers in general; this ambiguous passage is a rare example in which the term "rivers" rather than "great rivers" is used. There are a number of other Acts from the time which, like the 1472 Act refer to the passage of boats being hampered along the "great rivers". The great rivers included such rivers as the Thames and the Severn for which parts remain navigable today. Those looking for a general right of navigation have quoted what is effectively a preamble to this Act out of context.

There are many Acts in which public rights of navigation are created in non-tidal waters. This raises the question of why would Parliament legislate to grant a right of navigation along a particular river if a general right to use it already existed? In contrast, there are no Acts for navigating tidal waters. Parliament did not need to legislate because historically a right of navigation already existed.

In summary, while one section of the 1472 Act could be considered ambiguous when taken out of context, there is no legislation ancient or modern that confirms a public right of navigation along all rivers. The suggestion that a general public right of navigation along non-tidal waterways exists based on medieval statutes is incorrect.

## 2. INACCURATE INTERPRETATION OF THE *WILLS' TRUSTEES* CASE

There have been examples in which those trying to claim a general public right of navigation along non-tidal waterways misguidedly quote cases. One often used quote comes from the *Wills' Trustees* case. In this case Lord Wilberforce makes a comparison with other legal systems and quotes paragraphs from a New York case *Morgan v. King*<sup>6</sup>. In New York such a general right of navigation is recognised. This extract from a foreign case has been misguidedly quoted as being the legal position taken by the House of Lords in this matter.

## 3. NOTICE ASSERTING A PUBLIC RIGHT OF NAVIGATION

In the past we have been made aware of notices that were being sent out to riparian owners in England and Wales suggesting that unless they can prove there is no right of navigation along the river in question it will be assumed that such a right exists. **Such a notice has no meaning or effect in law.**

As discussed above, there is no general right of navigation for non-tidal rivers<sup>7</sup>; or lakes<sup>8</sup>. In the absence of an Act of Parliament specifying that the river in question is navigable or an express grant of a right of navigation, then the only method of proving that there is a right of navigation is that set out in the *Wills' Trustees* case.

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<sup>6</sup> 85 N. Y. 454

<sup>7</sup> *Hargreaves v Diddams* (1875) LR 10 QB 582

<sup>8</sup> ; *Bourke v Davis* (1889) 44 ChD 110

It would be necessary for the person wishing to assert such a right of navigation to prove it. A notice as described above incorrectly seeks to change the burden of proving a right of navigation from the person seeking to claim such a right on to the riparian owner having to resist such a claim.

## 7. CREATING A RIGHT OF NAVIGATION THROUGH IMMEMORIAL USE

Landowners will probably be aware if a particular stretch of river is subject to a Navigation Act, as it is a question of fact. The same is likely to be true if it has in the past been subject to express dedication that can be proven by users. Therefore the most likely area of contention is claims for navigation rights based on immemorial user. The rest of this section focuses on the necessary components of this user.

Whilst there is certainty from the courts that there is no general right of navigation on non-tidal waterways, there is less certainty about the requirements for proving a right of navigation through immemorial usage in England and Wales. The most comprehensive case in modern times is *Wills' Trustees*, this was a Scottish case and land law in Scotland contains some fundamental differences to that in England and Wales<sup>9</sup>.

Because of the lack of modern case law on the way in which a public right of navigation can be created by immemorial user in England and Wales, the next part of this section is based on similar case law and analysis of legal commentary. However, in the absence of further case law on immemorial user and navigation rights in England and Wales the precise evidence necessary to claim and to fight such claims must still be considered uncertain:

### Elements of Immemorial User in Creating a Public Right of Navigation- Current Uncertainty in England and Wales

Legal commentary suggests that a court in England and Wales would focus on both the physical characteristics of the particular river and on evidence of public user along the river since “*time immemorial*”.

The following extract from *Newcastle under Lyme BC v. Wolstanton Ltd*<sup>10</sup> provides a description from Viscount Maugham of what is meant by “*time immemorial*”:

*“...this presumption should in general be raised by evidence showing continuous user as of right going as far back as living testimony can go. The presumption is rebuttable, and for*

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<sup>9</sup> Whilst there is an indication from Lord Hailsham below that he considered the law in Scotland as it was described in the *Wills' Trustees* case to be similar to that in England and Wales this was only at a very basic level:

*“I am further fortified in this opinion by the reflexion that what I have now held to be the law of Scotland happens to coincide with what I believe to be the law of England which, without going into the authorities, I take it to be as stated in Jowitt's Dictionary of English Law at p. 1211:*

*‘The question whether a river is navigable or not seems to depend partly on its size and the formation of its bed, and partly on the use to which it has been put.’”*

<sup>10</sup> [1940] A.C. 860

*instance can be rebutted by proof that the custom alleged could not have existed in the time of Richard I."*

Some of the criteria described in this extract are set out in more detail below:

**Length of User:** The length of time for which use must be shown to have been going on is from "time immemorial", originally this was 1189 (the first year of the reign of Richard I). In practical terms though rather than going back to 1189 it is necessary to show use as far back as living memory can go.

In Scotland the length of user required has been accepted to be 40 years to be seen as being "*as far back as living testimony can go*". There is some debate in England and Wales but legal commentary suggests that the period of user the courts would require here would be 60 to 80 years.

Certain acts of the owner may have the impact of preventing a claim for a right of navigation based on continuous immemorial user by interrupting the period. This might include making it either contentious by being "with force" or "with permission", see below.

**Amount of Use:** In order to establish a public right of navigation, the use has to pass a sufficient threshold of frequency and amount of use. The sufficiency of use in Scottish land law, as described in *the Wills' Trustees* case was:

*"The use which is required for proof of navigability must, in my opinion, be regular habitual use, not necessarily throughout the year, but at least for a sufficient part of normal years to make the river of substantial practical value as a channel of communication or transportation."*

**Factual Navigability and Type of Use:** Modern case law refers to the need both for factual navigability as well as long user.

In the *Wills' Trustees* case, Lord Hailsham was of the view that users in canoes could not establish a right of navigation solely by that use; the river needs to have been navigated by other vessels as:

*"both capacity and use are required in order to establish a right of public navigation".*

He went on to say:

*"I do not believe that a new and limited public right of navigating canoes can arise in a river not otherwise navigable."*

This would appear to place a barrier against claiming a public right of navigation based on immemorial user in non-tidal waterways where vessels other than kayaks and canoes would not be able to pass, such as some white waters and where the river is particularly shallow.

**Use Must be As of Right:** Use 'as of right' is use that is without force, not in secret, and not on the basis of any permission from the landowner (this is based on Roman law which is why you may see the following which means the same in latin "*nec vi, nec clam, nec precario*"). These criteria are cumulative (i.e. use must be as of right AND without force AND without permission) and must be met in addition to the other elements mentioned above.

The two most likely to be relevant when considering the issue of modern usage and claims for navigation rights would be that the use must be “without force” and “without permission”.

**Use must be Without Force:** People using the right must have done so in a peaceable way and not have used the river or entered the river by force.

Clearly this would include cutting locks or breaking down gates and fences. Whilst such actions may be relevant in approaching a river over land, they may be less so when paddling along a river. The Courts have confirmed that force does not need to include physical action and that it is sufficient for the use to be contentious in a non-violent way (e.g. for the person concerned to have done something which they were not entitled to do after the owner had told them not to do it)<sup>11</sup>.

The issue of signs was specifically looked at in the Court of Appeal case of *Betterment Properties (Weymouth) Limited v Dorset County Council*<sup>12</sup> which was subsequently affirmed by the Supreme Court, Pattern L.J. highlighted again that physical force was unnecessary:

*“If the landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in.”*

It was recognised in the *Betterment* case that it was not necessary for all members of the public to see the sign, it was also accepted that frequently, signs prohibiting access are often torn down:

*“I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land.”*

When considering what signage should say that would effectively make continued use “by force” Sullivan J in *R (Lewis) v Redcar and Cleveland Borough Council*<sup>13</sup> said:

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<sup>11</sup> *R (Lewis) v. Redcar and Cleveland Borough Council* [2010] UKSC 11:

*“The opposite of ‘peaceable’ user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is ‘vi’ only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi.”*

<sup>12</sup> [2012] EWCA Civ 250

<sup>13</sup> [2008] EWHC 1813 (Admin)

*“Moreover, the notices should be construed in a common sense rather than a legalistic way because they were addressed not to lawyers but to local users of the land.”*

**Without Permission:** This may also be of relevance in the case of determining whether modern usage along rivers can be added to count towards the necessary period for proving a new public right of navigation based on immemorial use.

In the case of *Cumbernauld and Kilsyth DC v Dollar Land (Cumbernauld) Ltd*<sup>14</sup> the court made clear that a landowner couldn't rely on simply stating he was allowing the use by his permission:

*“If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right.”*

This awareness can be achieved with signage, i.e. the placing of a sign clearly stating that use of the river is only with your permission, but it may become a question of whether the signage was well enough positioned and what proportion of users were aware of the permission.

In the case of *The Trustees of the British Museum v Finnis and Others*<sup>15</sup> the court explained that where a landowner provided a route but did not mean to dedicate it, he should undertake some act that showed he only intended to grant a licence (i.e. show that use was with his permission) and that the common course was to shut the route for one day in the year.

In the case of *Odey and others v Barber*<sup>16</sup> it was held that an unsolicited permission from the landowner was still inconsistent with “as of right” use (i.e. without force, without secrecy and without permission). The permission was therefore sufficient to prevent the use building up over time to form a right as such use would be with the licence of the owner.

## 8. GUIDANCE ON SIGNAGE

Whether the signs are placed for the purpose of highlighting the landowner's permission or the absence of their permission to the user of the river, both the content and position of the signage will be important.

As a minimum, signs should be legible and visible to the user and should make the position regarding permission or its absence clear to the lay user. You could consider placing these signs along the river in a visible spot, particularly at known entrance points, you could also put them on your land at known access points or where cars are often parked to unload the canoes.

It is good practice to remember the wording should be aimed at the user and informed by the situation.

It is also worth noting that simply setting out “private” or “private land” may be taken to relate to the land adjoining the river not the river itself.

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<sup>14</sup> 1992 SC 357

<sup>15</sup> (1833) 172 ER 1053

<sup>16</sup> [2008] Ch 175

Use is likely to be considered to be “with force” where the user has been made aware of the landowner’s objection. If this is done verbally it should be done calmly and politely and it would then be important to keep a contemporaneous dated, written record of every time this is done, together with notes on the place where the discussion took place and that it was made clear that the canoeist was trespassing. In the case of a canoeing group that is regularly trespassing you could write a letter or email and make sure you keep a printed record of this as you may need to rely on it many decades later to refute a claim for a public right of navigation based on immemorial usage.

The signage should be photographed in situ with a date recorded, which should happen as a matter of course in the metadata in a digital camera but if you are relying on printed records, try and ensure the photo has a date recorded on it. It is important to remember that you may be relying on the evidence of the signage years later so keep the image safe.

You should consider the ongoing maintenance of the sign, noting that it is not uncommon for such signs to be quickly vandalised or removed, and also taking further photos in situ when the signs are maintained.

## 9. LIABILITY

### Occupiers’ Liability Acts 1957 and 1984

Occupiers may owe a “duty of care” to those that access their land as a result of the state of the premises or things done or omitted to be done on them. Who will be considered as the “occupier” for the purposes of these Acts is a question of fact and will depend on who exercises control over the premises.

The level of duty owed by the occupier to those that access their land varies depending on the circumstances, for instance whether or not the entrant has the permission of the occupier, whether entering pursuant to a private right or exercising statutory rights.

The courts have historically taken quite a pragmatic approach on liability, in *Tomlinson v Congleton Borough Council*<sup>17</sup> Lord Hoffman set out:

*“I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may be think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.”*

In the same case Lord Hobhouse also provided the following comforting statement for those that own land:

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<sup>17</sup> [2003] All ER (D) 554 (Jul)

*“Does the law require that all trees be cut down because some youths may climb them and fall?  
Does the law require the coastline and other beauty spots to be lined with warning notices?  
Does the law require the attractive water side and picnic spots to be destroyed because of a few  
foolhardy individuals who chose to ignore the warning notices and indulge in activities  
dangerous only to themselves?  
The answer to all these questions is, of course, no.”*

Set out below is a brief summary of the existing liability under Occupiers' Liability Acts 1957 and 1984.

### **Occupiers' Liability Act 1957- Duty owed to Visitors**

The duty of care owed to visitors is contained in the Occupiers' Liability Act 1957 (“OLA 1957”), the common duty of care is set out at section 2(2):

*“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”*

The duty owed is based on reasonableness and as a result the occupier will not always be expected to undertake costly preventative measures. Where the entrant is considered to be there with the permission of the occupier what is reasonable will be judged on a case by case basis. In general, if there is a danger the occupier should either take steps to guard them or give the visitor sufficient warning of the danger.

Section 2(3)(a) of the OLA 1957 Act specifically states that occupiers should be prepared for children to be less careful than adults. The rationale behind this is that children are less capable of perceiving risks and assessing danger than adults and in the case of young children will not be able to read warning signs. There may be something on the land which is particularly tempting to a child which should be considered, for instance brightly coloured poisonous berries within easy reach of children.

Section 2(4)(a) of the OLA 1957 Act specifically deals with the effect of warning visitors of dangers on the premises:

*“In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)--*

*(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe;”*

The result of the above is that a warning will be considered but it does not exempt the occupier from liability. The court will look at all the facts of the case and decide whether the occupier had done enough to ensure that the visitor was reasonably safe.

In deciding whether a given warning was sufficient the courts will look at amongst other things:

- i. Whether or not the warning was clearly visible or audible to the visitor. A sign placed in an obscure position is unlikely to be effective, likewise a verbal warning given without sufficient seriousness. It will also need to be given in a language that is readily understood by the visitor.

- ii. The more serious the danger is the more specific the warning must be. A warning should highlight the nature and extent of the danger, an unusual or hidden danger should be more clear and express.

Where the danger is obvious the courts will not always require the provision of signs. The case of *Staples v West Dorset District Council*<sup>18</sup> illustrates the point well. The claimant had crouched on the edge of a harbour wall that was sloped, wet and covered in algae; he slipped and fell seriously injuring himself. An action was brought under the OLA 1957 Act because no signs were in place to warn the claimant of the danger. The courts held that the danger of falling from a wet slippery wall was obvious and in the circumstances there was no duty to place a warning sign.

### **Occupiers' Liability Act 1984 - Duty Owed to Trespassers and Non-invitees**

The OLA 1984 sets out the duty of care owed to people other than visitors, for instance trespassers. The duty is to *"take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned."*

The duty is only engaged where all of the following three conditions set out at section 1(3) are met:

*"An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—*

*(a) he is aware of the danger or has reasonable grounds to believe that it exists;*

*(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and*

*(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection."*

Section 1(5) of the OLA 1984 provides that in an appropriate case, an occupier can discharge the duty he owes to persons other than visitors by taking such steps as are reasonable in all the circumstances of the case to give warnings of the danger concerned or discourage a person from incurring the risk. In simplistic terms warning signs may be considered sufficient to discharge liability depending on the circumstances, but they cannot be relied to do so in every case, as ever it will turn on the facts of the case. The OLA 1984 is vague on the standard of care that the occupier owes. In deciding what precautions an occupier should take two circumstances are particularly relevant. The first is how serious the danger is. The occupier is likely to be required to take more extensive steps to keep a trespasser out of or away from significant danger such as a cliff edge than from something that is not obviously harmful such as a shrub. The second is what sort of trespasser is likely to come. Case law makes it clear that an occupier is likely to have increased responsibility towards child trespassers, and therefore greater safeguards should be put in place for such trespassers.

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<sup>18</sup> [1995] 93 LGR 536

## **The effect of Unfair Contract Terms Act 1977 on contracting out of liability**

Before the Unfair Contract Terms Act 1977 (“UCTA 1977”) came into force an occupier of premises could, broadly speaking, impose conditions on granting access to the premises by which his liability for injury to a visitor would be restricted or excluded. Like any other exclusion clause in a contract, the enforceability of such a condition would depend on its reasonableness in the circumstances. However, the UCTA 1977 provided that it was unenforceable to attempt to evade liability for breach of contract or negligence resulting from things done in the course of a business or from the occupation of premises for business purposes. In practice this meant the occupier of land for business purposes (for example a farmer) could not contract out of liability for injury suffered on the land, even if the purposes for which the injured party was on the land were unconnected with the occupier’s business purposes.

Section 2 allows an occupier to exclude his liability under the OLA 1957, the duty of care owed to people on the premises by invitation or licence of the occupier (see above) where access is obtained for recreational or educational purposes which is not part of the occupier’s business.

### **Method of contracting out**

The liability for which an occupier of premises can exclude as a result of the change made to the UCTA 1977 by the OLA 1984, is his liability as an occupier for loss or damages suffered by recreational or educational visitors “by reasons of the dangerous state of the premises”. This is the scope of the section 2 exception.

This liability can arise either from breach of contract, for example breach of an express or implied term to take reasonable care for the visitor’s safety, or in tort, for example negligence or breach for the duty contained in the UCTA 1977.

In addition the prohibition on excluding liability for personal injury and death under the Consumer Rights Act 2015 does not apply where an occupier allowed the claimant onto the land for recreational purposes outside of the scope of the occupier’s business purposes, Consumer Rights Act 2015, s 66(4). It would still be open to the claimant to prove that the notice is unfair.

An attempt to exclude liability must clearly and validly be made before granting the access. This should be done in writing, and in such a way that it is seen by the visitor before entry onto the land. If an occupier is holding an “open day”, for example either a gate keeper should issue a written list of conditions to each visitor, including a specific exclusion of liability, or there should be a clear notice visible to each visitor to that effect. Ideally, there should be both.

A crucial point is the fact of exclusion of liability should be clear to each visitor before the contract of access is entered into. It is too late once it is passed through the gate, it is also too late to include the exclusion clause on the back of the receipt for entrance money since at that stage a contract would have already been made free of the exclusion. If access is being granted to a school party, for instance, an occupier should ensure that the exclusion of liability is made in the course of the pre visit correspondence which he will presumably have with the Headmaster. If it is a party of potholers or anglers for example, then likewise there will be doubtless preliminary correspondence with a club secretary or similar. To be on the safe side, it would be advisable to post a notice as well as a written disclaimer. If members wish to consider attempting to exclude liability the best option will be to instruct a legal adviser.

## **Charging for access**

If the granting of access to land for recreational or educational purposes falls within an occupier's business purposes he will be unable to avail himself from the section. Therefore, he will fall within the ambit of the provisions of the UCTA 1977 and any attempt to exclude liability of loss or damage suffered by the visitor on the premises would be unenforceable. If an occupier is already in the leisure business this would be the case in any event. If he is not and he is merely allowing access for recreation or education, he must consider carefully the question of charging. As already mentioned, if a charge is levied he will be running a risk, however theoretical, of the contract by which the access is granted being held to be a business. It is recommended that if a charge is made that it would be for specific non-profitable purposes, such as covering for expenses, paying a gate-keeper, making charitable donations etc., an occupier should thus account carefully for all money received and be in a position to prove that he was not embarking on a commercial profit-making venture.

If a profit is made there is a risk that any access allowed would be construed as being for a business purpose. Any records and accounts which could be used to show that the access was allowed for a specific non-profitable purpose should therefore be kept safe. It must be remembered that if an action for damages were brought against an occupier, several years may elapse between the incident and the action.

The CLA is certainly not advising against allowing access to land for recreational and educational purposes, only that an occupier should be aware of the risk inherent in so doing so that they can act accordingly.

## **Negligence**

Negligence is a civil wrong or "tort", a person is not liable in negligence for every act or omission that causes damage. For negligence to be found it needs to be shown that there was a failure to take the necessary care that the particular circumstances demanded which resulted in damage to another. The standard of the duty is that of the reasonable person. The court would ask itself how a reasonable person would have behaved in similar circumstances, this is an objective test. In reality there is often quite a bit of overlap between Occupiers' Liability and negligence.

## **Health and Safety**

Guidance on the law relating to health and safety regulations are beyond the scope of this Guidance Note.

## **Insurance**

Even where precautions have been undertaken, it is not possible to completely remove the possibility of an accident. As such you should make sure you have adequate public liability insurance in place to cover you in the event of an accident happening on your land.

You should also ensure that your insurers are made aware if you decide to provide permissive access and, ideally, you should have something back in writing from them that they are happy with this arrangement and agree that it is covered.

## 10. ENCOURAGING MORE PERMISSIVE ACCESS

From our experience of advising CLA members on providing permissive access they are often concerned about their potential liability. In England and Wales an occupier that provides permission for recreational users to enter their land will owe them the duty of care owed to visitors under OLA 1957. Whilst there is the defence of “Volenti non fit injuria” in England and Wales, meaning “to a willing person no injury is done” the courts are not always willing to completely absolve the occupier, instead finding some level of contributory negligence.

In England and Wales it is also possible to effectively exclude liability for some things in some instances, but attempts at excluding liability are not effective in all situations such as for death or personal injury. This process adds further complexity.

It could be argued that an occupier would be more willing to provide land or water for recreational use, particularly to sports such as canoeing, if they had the advantage of a reduced level of liability. It would make the law simpler and remove the necessity of putting up notices attempting to exclude liability towards such recreational users. Such a reduced level of risk could also have an impact on the cost of insurance premiums.

## 11. BRITISH CANOEING AND ACCESS AGREEMENTS

Over the years landowners have sought to sign up to access agreements with British Canoeing and their predecessors. This approach was supported by the Environment Agency who had an online toolkit giving advice to landowners on how to sign up to an access agreement. It is our understanding that new access agreements have been resisted by British Canoeing and others who have preferred to push for a right based on the research undertaken by Dr Caffyn.<sup>1</sup> The Reverend Dr Douglas Caffyn (who is not a lawyer) and is a canoe campaigner has claimed publicly since 2004 that there is a general public right of navigation, a theory which conflicts with legal commentary and case law.

Working with canoeing groups clearly brings benefits, and this should be seen as the preferred solution. This approach is also much more likely to lead to respectful behaviour and compliance with any conditions in the permission, for instance in relation to times of the year or minimum water levels for access. It should be noted though that there is no requirement for a third party user group to be part of an access agreement in order for the grant of permissive access to be effective. Landowners should be able to provide permissive access effectively by acknowledging, for instance with signage, that users may paddle along the stretch of river with permission.

## 12. THE WAY FORWARD

The CLA believes that increasing access for canoeists needs to be assessed in the light of the competing demands on rivers. Many different interests have to be considered if rivers can be used for the social and economic wellbeing of all. We recognise that people will want to get out and enjoy the countryside, but obviously there will be environmental considerations as well as the rights of riparian owners and other users to be considered.

We believe it will be important for canoeists to work with landowners and take a strategic approach, where the impact on factors such as cost of access provision and maintenance, environmental protection and fisheries are all assessed, and adequate provision made for

canoeists based on actual need at a local level. Any additional access should be provided through voluntary permissive access with payment to the riparian owner where requested. Future Environmental Land Management schemes should consider the potential to fund access to and on water for non-motorised boats as well as providing for improvements to related infrastructure and the CLA will continue to work with Government on such schemes.

Partnerships between local people, landowners and organisations will achieve the kind of access that everyone wants and needs.

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