Day Tripping – Liability for accidents in the great outdoors.

1. There is no greater pleasure than a stroll in the British countryside. We are fortunate in this country to have a diverse natural landscape at our disposal, from woodland to mountains, meadows to coastal paths. Most of us would accept that the price of access to these unspoilt areas of land is the risk that we may encounter hazards and obstacles that pose a greater danger than we are likely to meet on the wide, flat footpaths and carriageways of Urban Britain. What happens, then, when the unfortunate sightseer is injured off the beaten track. Does he have a claim?

2. The purpose of this article to consider the Court's approach to liability for accidents that occur in a rural setting, as a result of naturally occurring features, or manmade objects that have been introduced into the countryside. The focus will be on the s.41 of the Highways Act 1980 and the common duty of care under the Occupiers Liability Act 1957.

HIGHWAYS ACT 1980

A. Is there a highway at all?

3. The first step when considering a claim pursuant to s.41[1] of the Highways Act 1980 is to establish whether the rural path or track on which the injury occurred is a 'highway maintainable at the public expense' for the purposes of the Act. The starting point is s.36(1,) which provides:

   "All such highways as immediately before the commencement of this Act were highways maintainable at the public expense for the purposes of the Highways Act 1959 continue to be so maintainable (subject to this section and to any order of a magistrates' court under section 47 below) for the purposes of this Act"

4. Due to the extensive legislative history of the Act, the answer to this question inevitably involves a lengthy trawl through the history of the footpath itself, often by reference to ordinance survey maps and other information provided by the Authority. The basic three-stage process[2] is as follows.

   (i) Footpaths or rights of way in existence at the date of commencement of the National Parks and Access to the Countryside Act 1949 (16th December 1949) became repairable by the 'inhabitants at large'.

   (ii) Subsequently, S.38(1) of the Highways Act 1959 abolished the duty of the inhabitants at large to maintain highways at their expense. S.38(2) provided that 'highways maintainable at the public expense" included all

[1] Quote
[2] To which there are, inevitably, a number of exceptions beyond the scope of this Article.

highways which before the commencement of the Act were maintainable by the inhabitants at large.

(iii) Assuming, therefore, that the path in question became repairable by the inhabitants at large in 1949 it is likely to be a 'highway maintainable at the public expense' for the purposes of s.41 of the Highways Act 1980.

B. Is the path or track 'out of repair'?

5. S.41 requires the Highway Authority to 'maintain the highway', and maintenance is defined as including 'repair'.[3] When the Court is considering an inner-city pavement or carriageway, this does not tend to cause significant problems. Lumps, bumps, cracks and holes in the tarmac or concrete will often result in a finding that the 'surface' is 'out of repair'.

6. The situation is quite different in the countryside. Tracks and paths may be formed of nothing more than compressed mud and stones, covered with all manner of natural debris and vegetation. In what circumstances will can a rural path be said to be 'out of repair'?

The layout of the highway

7. It is not always clear where the highway ends, and the surrounding land begins. Two cases illustrate the difficulties faced by Claimants in this regard.

   (a) In Kind v Newcastle Upon Tyne Council[4]. the Claimant served a notice upon Newcastle Council under s.56 of the Highways Act 1980 in respect of 'Prestwick Car' an unclassified rural road used primarily for farm access. The question for the court was whether the Crown Court's finding that the grass verges were not suitable for normal traffic meant that the highway as a whole was 'out of repair' for the purposes of the Act. Relying upon the Court of Appeal decision in Burnside v Emerson[5], Scott Baker J (as he then was) thought that the determinative question was whether 'the highway as a whole was reasonably safe for ordinary traffic'. Having specific regard to the rural character of this road, and the fact that the metalled part of the carriageway *was* suitable for traffic, he decided that the highway could be said to be 'reasonably passable', and therefore also in a 'good state of repair', even though the verges themselves were not suitable for all traffic (particularly cyclists and pedestrians).

   (b) In Thompson v Hampshire County Council[6], Miss Thompson was walking along a narrow beaten earth track on the verge of the A337 in the New Forest. The track was not an official or classified footpath but had been created over many years by persons walking to and from a nearby campsite. Ms Thompson could not see where she was putting her feet. She fell into a ditch, and broke her ankle. The issue for the Court of Appeal

[3] S.329(1).
[4] [2001] EWHC Admin 616.
[5] [1968] 1 WLR 1490.
[6] [2004] EWCA Civ 1016.

was whether the unsafe 'layout' of the path immediately next to the ditch could result in a breach of section 41. Rix LJ concluded that it did not. He held that the duty to maintain or repair relates only to the physical *surface* of the highway. It was not wide enough to encompass the potentially dangerous contours of the land, nor the juxtaposition of path and ditch. The duty was not a general duty to make the highway safe for its users.

8. Whether or not the verges technically form part of the 'highway' (and the Crown Court found that they did in Kind), the duty under the Act cannot have been intended to extend the Highway Authority's liability under s.41 to peripheral, naturally occurring features which do not effect or obstruct the reasonable use of the highway by ordinary traffic.

Obstructions

9. But what if the allegedly dangerous condition of the highway stems from an obstruction placed onto the footpath itself? Can the highway be said to be 'out of repair' in this situation? The Court of Appeal in Worcester County Council v Newman[7] thought not. In that case one of three rural footpaths had a barbed wire fence placed across it. Complaints were made to the Highway Authority under s.59 of the Highways Act 1959 (the precursor to s.56 of the 1980 Act). The Court held that 'out of repair' simply meant that the surface was 'defective or disturbed in some way'. An obstruction which makes a highway unusable does not make it out of repair. Returning to the question posed at the beginning of this article, therefore, if the unlucky sightseer trips over a low fence, or a stile, running across the path, his claim under s.41 of the Highways Act 1980 is likely to fail[8].

Transient hazards

10. One thing that cannot be avoided when we venture into the outdoors is the Great British Weather. Wind, rain and snow often leave rural paths and roads covered with leaves, mud and water, and virtually impassable as a result. The recent amendment[9] to the Highways Act 1980 means that the relevant highway authority is now under a duty 'to ensure so far as reasonably practicable, that safe passage along a highway is not endangered by snow or ice'. The amendment was introduced in response to the decision in Goodes v East Sussex County Council[10] in which the House of Lords decided that the duty to maintain the surface of the highway did not include a duty to prevent the formation of transient features such a snow or ice. This begs the question as to whether a claim under s.41 is possible if somebody slips or trips and injures themselves as a result of natural debris which has accumulated on a country path.

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[7] [1975] 1 WLR 901
[8] He may of course succeed in either negligence or nuisance, depending upon the facts of the case.
[9] S.41(1A).
[10] [2000] 1 WLR 1356

11. The answer appears to be, in the case of leaves or vegetation, that if they are so deeply rooted in or attached to the surface of the path or highway as *to form part of its surface*, then the Court is likely to conclude that s.41 applies. This is illustrated by two cases.

    (a) In Worcester County Council and Newman[11] (see above) two of the rural footpaths had dense vegetation, including a 7ft high hawthorn hedge, growing on them. The Court of Appeal concluded that this vegetation was part of the structure of the highway itself, and therefore the footpath was 'out of repair' for the purposes of the Act. It is interesting to note, however, that Cairns LJ stated that if the branches or thorns had merely been hanging over the footpath (although, presumably, growing from the verges) then the highway would not be 'out of repair'.

    (b) In Rich v Pembrokeshire[12], (a hearing of an application for permission to appeal) Sir Martin Norse held that the trial judge had been entirely justified in finding that a slipway that ran down to the tidal waters of the Cleddan estuary, and which had become covered in algae, upon which the claimant slipped, was in principle covered by s.41. The judge had found that although the algae was not actually rooted in the slipway, it had become so adherent to the existing surface that for all practical purposes it had *become the surface of the highway*. Transposing this decision into the rural setting, there is no reason in principle, therefore, why, moss growing on an old cart bridge, for example, should not result in the highway being 'out of repair'.

12. What of more even more transient hazards, such as mud and water? In Misell v Essex County Council [13] Coleman J had held that s.41 applied where a layer of mud had accumulated on a road, causing the Claimant's to crash his car. It is questionable whether Misell continues to apply in light of the House of Lords decision Goodes, and in any event it may be better viewed as a case involving defective drainage, in which case it can be brought within the broad requirement that the 'structure' or 'fabric' of the highway must be of repair. It is submitted that if a Claimant has merely slipped on mud, or puddles of water on an otherwise ordinary rural path, it is most unlikely that the Court would conclude that the highway was 'out of repair'. Goodes is still good law, and had Parliament wanted to extend liability under s.41 to transient hazards other than snow and ice, it could have done so.

13. Even if s.41 is engaged the obvious practical difficulty of preventing the accumulation of natural debris on rural paths and tracks is likely to give the Highway Authority a strong defence under s.58 of the Act. It is to that issue that this Article now turns.

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[11] Ibid.
[12] [2001] EWCA Civ 410.
[13] [1984] 93 LGR 108.

C. The s.58 Defence

14. S.58 of the Act provides that:

> In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.

15. Of particular interest in the context accidents on a rural highway are subsections (2)(a) and (b) which respectively require the Court, when determining whether the Defence has been made out, to have regard, inter alia, to "*the character of the highway, and the traffic which was reasonably to be expected to use it*", and "*the standard of maintenance appropriate for a highway of that character and used by such traffic*"

16. Any experienced highways officer will tell you that it is simply not possible to walk and to inspect on a regular basis the spider's web of rural paths and footways for which many Highway Authorities are responsible pursuant to the 1980 Act. It is common practice, therefore, for these authorities to employ a once-yearly inspection regime, backed-up by a system of 'ad-hoc' inspections, whereby the inspection team will respond to complaints and reports by members of the public as and when they are made.

17. An example of a case in which the Defence was successfully invoked in a rural setting is Whiting v Hillingdon London Borough Council[14]. The Claimant was walking along a country footpath which was maintained at the public expense. In order to pass another person walking in the opposite direction she stepped off the ash-surfaced path into the foliage at the side of it. She struck her foot on a concealed tree stump, fell over and sustained injury. The claim was brought pursuant to s.44(1) of the Highways Act 1959 (the predecessor of s.41 of the 1980 Act), as well as under the Occupiers Liability Act 1957. James J accepted that the presence of the stump constituted a danger, and therefore that s.41 was *prima facie* engaged. The Defendant gave evidence that it had over 380 miles of rural footpaths under its control, and that it inspected them on a yearly basis. This particular footpath had been inspected not only in the summer of 1965, but again in December of the same year, in response to a number of complaints from members of the public, and on neither occasion was the tree stump identified. The judge concluded that the stump was probably produced by a tree being felled in February 1966, when repairs were carried out on the path, and that it would have been 'asking too much' of the authority to have had a further inspection between February and April, when the accident occurred. The statutory defence was successfully made out.

[14] [1970] LGR 437.

18. It should not be difficult for Highway Authorities successfully to invoke the s.58 defence in a rural setting. The test is not whether it is practicable for the authority to carry out a greater number of inspections per year than it currently does, but whether the frequency of inspections is itself reasonable in all the circumstances of the case[15]. As long as the Authority has a clear record of inspections, complaints and any repairs carried out, and a sensible and rationale system for classifying different highways under its control[16], the spectre of personal injury claims based upon hitherto unknown or undiscoverable natural features and obstructions should be banished.

OCCUPIERS LIABILITY ACT 1957

A. Who is the occupier?

19. It is not uncommon to see personal injury claims pleaded under both the Highways Act 1980 and the Occupiers Liability Act 1957, as well as alleging negligence and nuisance. The overlap between these causes of action is particularly pronounced in the countryside, where rights of way cut across private land, often unbeknownst to the landowner until an accident occurs.

20. This gives rise to two distinct issues. First of all, if a rural highway is maintained by a local authority, but is owned by a private entity, against whom do the respective causes of action lie? In Whiting, the Court was faced with a footpath for which the Defendant accepted responsibility to maintain pursuant to their statutory duties. The land itself, however, was owned by a Property Company, who in turn had let it out on a long lease to a development company. The judge, whilst accepting in principle that more than one person could be the 'occupier' for the purposes of the 1957 Act, held that a local authority could not be rendered an occupier merely because they had a statutory duty to maintain the footpath under the Highways Act.

21. The company which owned the land was not joined as defendant to the claim in Whiting. If it had been, however, and assuming that the footpath was a right of way, then it is would have had a good defence to any claim under the Occupiers Liability Act. The reason for this is the House of Lord's decision in McGeown v Northern Ireland Housing Association[17], that a landowner owes no duty under the 1957 Act to maintain a public right of way passing over his land in respect of non-feasance.

22. The combined effect of Whiting and McGeown is to make it crucially important for Claimants to identify the owner of the land, the nature and classification of the footpath, and the party responsible for its maintenance, before issuing proceedings. The stark reality is that if the footpath is a right of

[15] Pridham v Hemel Hempstead Corporation (1971) 69 LGR 523

[16] James J accepted in Whiting that the local authority were not entitled to treat every rural footpath within their responsibility as having equal importance, particularly where, over the course of time, the surrounding area (although initially rural in character) had been developed to include a number of offices and residential properties.

[17] [1994] 3 WLR 187

way, there will be no claim under the Occupiers Liability Act against *either* the landowner or the relevant highway authority, and the claim is likely to fail.

23. Finally, it is interesting to consider where this leaves the position of trespassers under the Occupiers Liability Act 1984. The problem can be illustrated by a brief example. A field owned by Farmer Z has a narrow path leading through it. The path is a designated right of way, crossing what is otherwise private land. Mr X, a rambler, trips over a hole on the path whilst exercising his right of way. His claim under the Occupiers Liability Act 1957 is likely to fail under the principle in McGeown. A few hours later, Mr Y climbs over the perimeter fence into the field, intending to steal some crops. He is clearly a trespasser at this point. Farmer Z notices Mr Y and chases him across the field and onto the path. As Mr Y is crossing the path, not knowing it to be a right of way and not intending to use it as such, he trips in a different hole and suffers injury.

24. Does the principle in McGeown apply? It is submitted that it does. Irrespective of his intention in entering the field in the first place, at the time that the accident occurred Mr Y was on the path as of right, not as a visitor or a trespasser. A finding to the contrary would undermine the rationale of the House of Lords decision in McGeown and create the absurd situation that trespassers might be owed a duty where persons lawfully present on the land are not. Alternatively, even if Mr Y was not found to be exercising his right of way at the material time, it is likely that a court would find that the risk of trespassers falling on the path was not one which the occupier could 'reasonably be expected to offer some protection against' in all the circumstances of the case (s.1(3)(c) of the 1984 Act).

B. The common duty of care

25. Section 2(2) of the Occupiers Liability Act 1957 sets out the common duty of care owed by the occupier to visitors:

    "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"

26. There are two aspects of the duty to act 'reasonably' which are of particular importance when dealing with personal injury claims in a rural setting. The first is the extent to which the occupier, in order to fulfil the common duty of care, is required to remove natural features growing from the land, or even to modify the layout and contours of the land itself. Secondly, in what circumstances do visitors requires warnings of obvious, naturally occurring dangers?

Natural features

27. An interesting case, which to some extent draws together the various themes of this article, is Mills-Davies v RSPB.[18] The Claimant had taken his dogs for a walk on a nature reserve owned by the Defendant. The reserve consisted of remote woodland habitat, through which a narrow path had been cut. At various points along the path there were small sapling stumps which had been left behind after the path had been cleared a few years previously. The Claimant tripped on one of these stumps, fell forwards, and impaled his eye on a second stump.

28. Judge Jones, sitting as Deputy High Court Judge, was not satisfied that the claimant had proved that his accident occurred in the manner alleged, and the claim was dismissed. Of greater interest, however, is the judge's further comments that even if the Claimant had established that he had fallen onto the second stump, the claim would have failed because the common duty of care did not require the RSPB to remove these stumps from the nature reserve. Stumps such as these were commonplace in woodlands and on woodland trails, and the presence of the stumps, having regard to the character of the area, the small number of visitors who walked this part of the reserve, and the absence of any previous complaints or accidents, meant that there was no breach of duty. Furthermore, the judge concluded that the risk of a penetrating injury was very small, and a finding of liability would require other occupiers of similar rural land to remove any type of natural debris, including sharp pieces of bracken, twigs and sticks, which could conceivably cause injury. This, the judge held, would go far beyond the duty to take reasonable care to ensure that visitors were reasonably safe when walking trails such as this one.

29. The judgment in Mills-Davies provides a welcome injection of common-sense into an area which has the potential to depart considerably from any semblance of reality. The Claimant's suggestion that forseeability of injury, by itself, was enough to establish a breach of the common duty of care would have been out of line with established authority[19], and would have left the liability of rural occupiers virtually open-ended.

30. A judgment along similar lines was handed down by Philip Mott QC, also sitting as a deputy High Court Judge, in Gallagher v Haven Leisure.[20] The case involved a claimant who tripped in a hole in a caravan park situated on the North Coast of the Isle of Wight. The site was separated into a series of grass terraces, with short slopes between one level and the next. It was accepted by the Judge that although there was no evidence of any previous accidents, the caravan site was a commercial undertaking, and since visitors to the premises would not necessarily be used to walking in country surroundings on uneven ground, any unforeseeable dangers should be avoided if possible. This being so, however, the judge went on to conclude that the obvious holes, hollows and slopes in the site were part of its 'charm', and it would be too much to expect the whole site to be manicured. A natural gully or hole was, he concluded, within the 'range of features reasonably to be expected'. Again, relying upon a quasi-floodgates argument, the judge concluded that to have

[18] 2005 CLY 4196 (QBD)
[19] The premises, or land, must be 'unsafe': Manning v Hope, The Times, February 18th 2000 (CA).
[20] LTL 11/12/2003 (QBD)

expected the Defendant to fill-in the hole would require many other holes also to be removed, creating an unreasonable and unnecessary burden and destroying part of the character of the site.

Warnings

31. Section 2(4)(a) of the Occupiers Liability Act 1957 provides that:

    "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".

32. It would come as no surprise to most people who take advantage of the countryside that it is necessary to be vigilant in respect of potential hazards. Just as the mountaineer does not embark upon a trek across a rocky outcrop without appreciating the risk that he may fall, nor is it unreasonable for occupiers of rural land, albeit in less extreme circumstances, to expect their visitors to keep their eyes wide open. And yet, on a number of occasions the Court has been required to deal with claimants alleging that they should have been warned of the presence of these obvious dangers.

33. Perhaps the highpoint of this litigious optimism is to be found in the case of Cotton v Derbyshire Dales District Council[21]. The Claimant and his party of 7 other young men and women had spent the afternoon drinking in a number of public houses. The Court found that they were not drunk, but were in 'high spirits' and decided to go for a hillside walk in a local beauty spot, up to a hill called 'High Tor'. After a while, one of the party realised that she had to return to her car to pick up her children. Rather than retracing their steps, however, the Claimant and the rest of the group found what they thought was a 'path' leading down towards the river from high up in the hills. In fact, this was not a path at all, but was a steep slope of loose scree, at the end of which was a 60 foot cliff. Somehow, the Claimant ended up sliding off the edge of the cliff and suffered serious injury.

34. The Claim was based on fact that, at the other end of the main path, there was a sign warning walkers that the 'cliffs can be very dangerous'. It was alleged that had a similar sign be in place where the Claimant had entered the path, he would not have acted as he did and would not have dismissed the Claim. Henry LJ held that there was no duty to warn of dangerous which are themselves obvious. Once it was appreciated that there was no path, the danger of proceeding down a steep gradient on a loose surface, without being able to see over the brow, was patent to any body exercising reasonable judgment.

35. Case law under the Occupiers' Liability (Scotland) Act 1960 has developed in a similar vein. Section 2(1) of that Act, upon which 1984 Act in England is based, provides that the occupier must take reasonable care to see that the

[21] The Times, 20th June, 1994.

visitor does not suffer injury by reason of "*dangers which are due to the state of the premises or to anything done or omitted to be done on them*". An illuminating example is the recent decision of the Court of Session in Struthers-Wright v Nevis Range Development Company[22]. The Claimant was an experienced skier who had used the slopes provided by the Defendant on a number of previous occasions. He disembarked from a chairlift and was following tracks left by a previous skier, on his way to a particular run, when the weather suddenly closed in and reduced visibility to 50 to 60 yards. He suddenly slid through the snow and off the edge of a cornice, sustaining significant injuries. It was alleged that the Defendant, who was the occupier of the ski-resort, should have placed warning signs or markers along the ridge to guide skiers onto the runs and away from dangerous precipices. The Court disagreed.

36. Lord Turnbull held that there could be no duty to provide protection, whether by signs or barriers, against obvious and natural features of the landscape. To suggest that the relevant 'danger' was the risk itself that a skier would, in poor visibility, fail to appreciate that he was approaching the edge, was circular. Since there was no duty to guard against natural dangers arising from 'the state of the premises', it would, the Court held, be illogical to suggest that a failure to place warning signs about such a natural feature could constitute 'a danger arising out of something done or omitted to be done' on the same land. Furthermore, even if such a duty did exist, it was appropriate to have regard to 'the natural beauty and attractiveness of the wilderness site' and, balancing this consideration against the alleged danger, additional barriers or signs would have been a 'disproportionate response' to the risk which was said to exist.

Children

37. Finally, it is also worth remembering that the extent of the duty to warn may depend upon the age and characteristics of the individual involved. For example, Section 2(2) of 1957 Act requires occupiers to have regard to the fact that 'children [will] be less careful than adults'. Transposed into the countryside, this consideration takes on a slightly different form, since the standard of care may be informed by the decision of the parents to allow their children venture into the wilderness to begin with.

38. The quintessential example of this is the well-known case of Simkiss v Rhondda[23]. Here the Defendant was the occupier of a mountain, at the bottom of which was an almost vertical slope of grass, scattered with boulders. The Claimant, a child, was playing on the slope (sliding on the rocks using a blanket), when she fell about 40 feet onto the road below, suffering serious injuries. The Court of Appeal concluded that since the child's parents had happily let her play on the slope, and had not contemplated an injury occurring in this way, it would be wrong to impose on the Council a higher standard of

[22] [2006] CSOH 68.
[23] (1981) LGR 460.

care than that of a reasonably prudent parent. Waller LJ giving the leading judgment, said[24]:

"There are many parts of the country with open spaces adjacent to houses where children play unattended, and this is to be encouraged. It is not unreasonable, in my judgment, for such occupiers to assume that the parents of children have warned them of the dangers of natural hazards, and would not allow them to play round such places unless the children appreciated the dangers".

THE RIGHT TO ROAM

39. The Countryside and Rights of Way Act 2000 conferred a right on any person to 'enter and remain on access land for the purposes of open air recreation', so long as no damage is caused and the general restrictions contained in Schedule 2 of the Act are adhered to[25]. 'Access land' is defined as any land shown as open country or as a registered common on the maps created by the Countryside Agency and the Countryside Council for Wales. It also includes unmapped land more than 600 metres above sea level and unmapped registered common land. Cutting through the detail, this means that most moors, downs, heaths, mountains, and other wilderness areas will be covered, as well as coastal land if the Secretary of State chooses to extend the right of access to it.

40. The Occupiers Liability Act 1957 was amended[26] by the 2000 Act so that no person entering land pursuant to the 'right to roam' is deemed to be a 'visitor' of premises for the purposes of the Act. Thus, any claim against landowners by ramblers roaming about on this land must be made as if they are trespassers, pursuant to the 1984 Act.

41. However, the 2000 Act also introduced some striking limitations on the occupier's liability under 1984 Act which give rise to some rather unsatisfactory inconsistencies in the law. Section 1(6A) of the 1984 Act provides as follows:

At any time when the right conferred by section 2(1) of the Countryside and Rights of Way Act 2000 is exercisable in relation to land which is access land for the purposes of Part I of that Act, an occupier of the land owes (subject to subsection (6C) below) no duty by virtue of this section to any person in respect of—

(a) a risk resulting from the existence of any natural feature of the landscape, or any river, stream, ditch or pond whether or not a natural feature, or

(b) a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile.

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[24] At page 14.
[25] These include, amongst other things, not using a metal detector and not starting fires.
[26] Section 1(4)

42. Section 1(6B) goes on to state that any plant, shrub or tree, of whatever origin, is to be regarded as a natural feature of the landscape. On the face of it, this is sensible, since landowners will have little control over, or knowledge of, the use of their land by persons exercising the right to roam, and these persons, more than most, must be taken to appreciate the risk created by natural features. However, since no such limitation on liability exists in respect of normal trespassers, it is possible to envisage some situations where the occupier will owe a greater duty to persons who are not lawfully on his land. Take, for example, a large, concealed, natural ditch on an area of heathland, in which there have been a number of previous accidents, to the occupier's knowledge. It is conceivable that if a trespasser fell in this ditch, the occupier would be in breach of duty. If a rambler roamed into it, liability would be far harder to establish because of the amendment to section 1[27]

CONCLUSION

43. The perceptible policy consideration that runs through all the cases involving accidents in a rural setting is the need to balance the protection of individuals against risks which can and should be prevented, against the countervailing importance of preserving an individual's choice to visit areas of natural beauty, even if this also means preserving inherent but obvious dangers. The high point of this 'social utility' test can be found in the judgement of Lord Hobhouse in Tomlinson v Congleton Borough Council[28], at paragraph 81:

> "…it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. 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 that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no."

44. As long as this balance continues to be struck by the Courts, landowners and visitors alike can be sure to enjoy the British Countryside to its full potential.

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[27] It should be noted, however, that subsection 6C does state that "Subsection (6A) does not prevent an occupier from owing a duty by virtue of this section in respect of any risk where the danger concerned is due to anything done by the occupier, (a) with the intention of creating that risk, or (b) being reckless as to whether that risk is created, and it may be that the example above falls into the latter category". The failure of the occupier to act in response to previous accident would not, however, be 'something done' for the purposes of the Act

[28] [2003] UKHL 47; [2004] 1 AC 46.