
CAIRNGORMS LOCAL OUTDOOR ACCESS FORUM

Title: **Summary of Scottish access and liability court cases**

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Purpose: This paper aims to summarise the three main court cases to date which have concluded under the Land Reform Act (Scotland) 2003. The cases are:

- Tuley v. Highland Council;
- Gloag v. Perth and Kinross Council and
- Snowie v. Stirling Council and the Ramblers Association and the linked case of Ross v. Stirling Council.

Another early case that was settled out of court has been included as have two recent liability cases.

Advice Sought None – for information and comment only

ACCESS CASES

1. Tuley v Highland Council

1.1 The case involved the obstruction of a track (the "red path") by a barrier in Feddonhill Wood in Ross-shire. The barrier effectively prevented access to horse-riders who had historically been able to access it.

1.2 Highland Council served a notice under Section 14, requiring the Tuleys to remove the padlocks from the barriers or widen the existing gap to1.5 metres and permit the passage of horse riders.

1.3 The case looked at four matters:

a) The purpose or main purpose of the obstruction;
b) The entitlement to exercise access right;
c) The responsible or irresponsible use of the path; and
d) The amount of use.

1.4 The Sherriff found in favour of Highland Council. Scotways offer the conclusion that if any regular responsible access is possible and the land owner in the course of keeping out the irresponsible restricts the rights of access of a person behaving responsibly, he is in breach of Section 14. Mr Tuley has now lodged an appeal against that decision. The Sherriff decided that Mr Tuley should only pay two thirds of the Council's costs, rather than the full amount.

2. Gloag v. Perth and Kinross Council

2.1 This was an action by Mrs Ann Gloag under Section 28 of the 2003 Act for a ruling by the Sheriff that Kinfauns Castle and that part of its grounds lying within a security fence was land excluded from access rights on privacy grounds (about 14 acres). She also claimed that public access into this area would breach her human rights. Perth & Kinross Council defended the action and proposed an alternative boundary line for exclusion of a smaller area of land from access rights (about 10.2 acres). The Ramblers' Association joined in the defence of the action.

2.2 The Sheriff found in favour of Mrs Gloag and the following points emerged:

a) The court was required to consider the characteristics of the house and its location in considering the extent of the area of land which the Act excludes from access rights. As there is little guidance in the Act, judicial knowledge may well have a part to play.
b) The Scottish Outdoor Access Code does not determine what land is included in access rights although the topography of the land will have to be considered.
c) Since the Act requires the Court to establish what is sufficient land to enjoy privacy and enjoyment there is no need to refer to the Convention of Human Rights.
d) It is for the Court to determine the extent of land to be excluded.
e) The Sheriff considered that there were circumstances in which irresponsible access-taking might verge on being a breach of the peace.

3. Snowie v Stirling Council and the Ramblers' Association
Ross v. Stirling Council

3.1 The action arose as a result of an appeal to the Sheriff Court against a Section 14 Notice served on the Snowies by Stirling Council. The notice required them to open at least one pedestrian gate for access to the Boquhan Estate. The Snowies also applied for a declarator under Section 28 of the Act that specified land was excluded from the exercise of access rights on privacy grounds. The Ramblers Association joined the action as an interested party, as second defenders.

3.2 In April 2008 the Sherriff upheld the notice served by Stirling Council which required a driveway gate to be unlocked, and determined that the Snowies were entitled to a privacy zone around their house amounting to 12.6 Acres. The Snowies are appealing against the decision.

3.3 The Sheriff awarded expenses (costs) against both the Snowies and the Rosses in favour of Stirling Council. He also awarded expenses against the Snowies in favour of the Ramblers Association.

3.4 The following points are of note:

a) The detailed analysis of the legislation in Gloag was adopted. The only factors to be taken into consideration in making that determination include the location and other characteristics of the house. No mention was made of the Code as being a consideration to be taken into account.
b) The test of sufficient land for privacy and enjoyment was such as was reasonably required, not by the actual resident but the kind of person who would normally live there.
c) A reasonably substantial area was required for Kinfauns (Gloag case) and Boquhan for the enjoyment of the house itself, and not just the enjoyment of the grounds. This was not a situation like Kinfauns where the Sheriff decided on an area which was already clearly defined so this may be a pointer for the future.

4. Caledonian Heritable Limited v. East Lothian Council

4.1 This was the first case to come to court under the new access legislation and was eventually settled out of court. The case concerned a luxury development on the East Lothian coast where the developers blocked access to the public, and East Lothian Council served a Notice on them requiring them to remove obstructions. The developers appealed to the court against the Notice and claimed that the 2003 Act did not apply to the area under development for various reasons including protecting privacy and the fact that construction work was under way. The case also raised the issue of the extent of access rights over golf courses. There were two days of legal debate, mainly on the issue of the validity of the Notice served by the Council on the developers, following which the Sheriff decided that the case should go to a full hearing. The case was eventually settled as the developers removed the obstructions, so it never reached a full hearing of the evidence.

LIABILITY CASES

5. Welsh v Brady

5.1 This concerns a dog-owner's potential liability for injury caused by his dog. In this case a woman was walking her dog in open fields when she was injured in a collision with a Labrador. She sued the dog owner for damages for injuries to her knee. The case was considered both under the general principles of negligence and in relation to liability under

the Animals (Scotland) Act 1987. Under the 1987 Act there is strict liability for injury caused by animals if they have physical attributes or habits which are likely to cause injury to people unless the animals are controlled or restrained. The Judge rejected liability on this basis – he said that there would be 'incredulity' among the public if it was suggested that Labradors were likely to be dangerous unless restrained. In relation to the claim of negligence, he said that what occurred was an unfortunate and unforeseen collision. In the circumstances of the case the dog-owner had not been negligent. However, he said that it might be different in other circumstances. For example, in a public place where there were children present it might be necessary to put the dog on a lead.

6. Poppleton v Peter Ashley Activities Centre

6.1 This was an English Appeal Court decision which was an appeal against an award of damages to a man who was injured in a fall from a climbing wall. He claimed that the Activities Centre had not given him any training or warned of the potential dangers. At first instance he was awarded damages on the basis that the Activities Centre was 25% at fault. However, this was overturned on appeal. The Appeal Judges said that it was quite obvious that a serious injury could result from a fall, and that no amount of matting could remove all risk. They rejected his claim that the Centre should not have allowed him to climb without assessing him first, indicating that otherwise it would have wide-ranging implications for dry ski slopes, mountain bike tracks, swimming in pools or the sea, and gymnasiums. The case confirms that where people engage in activities that involve a degree of unavoidable risk, they may have no recourse if they are injured, even if they are paying for the use of facilities and/or equipment.

7. Discussion

7.1 The two main cases of Snowie and Gloag both concerned issues to do with privacy ad curtilage around large private homes – the CNPA are not currently dealing with such issues. The Tuley case was of interest in respect of multi-use and to what extent a land manager could prohibit access on the basis of anticipated use and subsequent damage – and this is of relevance to several access cases we are dealing with.

Comments and observations from the Forum members are invited

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