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A pub, a field and some signs – a case study on the pragmatics of proprietorship and legal cognition.

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Abstract:

This paper uses a case study on the management of the grounds of a city-fringe pub to explore land and premises owners' perception of, and responses to, the legal requirements and risks of public access to their property. The paper examines how an *approximate* lay notion of occupiers' liability is acquired and used from an actor's 'internal point of view' (Hart 1994).

The study set out to empirically explore the suggestion (e.g. Jones 1984; Bennett & Crowe 2008) that landowners' expressions of concern about potential occupiers' liability for visitor injuries may function as a polite and acceptable proxy for a more visceral (and less publically expressible) sense of proprietorship but actually found something more prosaic. In the case study the 'liability risk' theme was invoked through copious cautionary signage by a premises manager who showed little overt anxiety about liability or safety and no strong proprietorial orientation towards his land.

To make sense of this conundrum the paper develops a theoretically informed interpretation of the case study which draws upon Bourdieu's notion of the guiding hand of 'habitus' (2005), Mutch's (2000, 2001 and 2003) and Pratten's (2007 a, b and c) work on the constancies and changes within UK pub management, Berger & Luckmann's (1971) concept of the 'sedimentation' of knowledge, Delaney's (2010) call for holistic, multi-disciplinary, 'nomospheric investigations' when studying spatio-legal behaviour, Sack's (1986) notion of

the ‘space clearing’ function of territoriality and Altman’s (1975) highlighting of the importance of express normative declarations for ambiguous ‘secondary territories’ that are neither wholly public nor private.

Through this synthesis insight is given into how a form of thinking and acting about law, liability and proprietorship can become embedded and replicated without needing at any stage a consciously developed self-understanding of that action. The paper considers the implications of this for land and premises management and the study of legal cognition within lay professional communities.

Keywords:

Habitus - Occupiers Liability – Land Management – Legal Cognition – Public Houses

1. Introduction

This paper is a continuation of my recent research projects (Bennett, 2009, 2010, 2011, Bennett & Gibbeson, 2010) in which I have sought to examine the processes by which the abstract conceptual doctrines of the law are translated by lay communities such as cemetery managers or tree owners and applied into their day to day management of their physical environment. These studies have centred upon investigating the ‘common sense’ lay interpretation of the Occupiers Liability Acts 1957 and 1984 and specifically, how important that legal cognition actually is in land and premises management practice.

This journey started in the summer of 2008 when my colleague Lynne Crowe and I were commissioned by member agencies¹ of the Countryside Recreation Network² to conduct a scoping study to identify any existing research on the question of whether landowner anxieties about public liability towards recreational visitors affected the extent to which they allowed (or tried to curb) public access to their land. The study also involved 21 semi-structured interviews of predominantly public sector landowning bodies.

¹ The Forestry Commission, the Scottish Government, Sport Northern Ireland, and the Northern Ireland Environment Agency.

² <http://www.countrysidecreation.org.uk/>

The literature review found only a few existing studies on this issue, and these mostly related to the North American experience (e.g. Teasley et al (1997), Gentle et al (1999), Wright et al (2002) and Henderson (2007)). Our interviews suggested that, for large pro-access public landowners at least, the risk of liability for any injuries sustained by recreational visitors was something viewed pragmatically, and to be taken ‘in their stride’ by those managers and their organisations. Our scoping study (Bennett & Crowe 2008) thus found no direct evidence of a withdrawal of access to private land as a result of fears of Britain’s so called “compensation culture” (Williams, 2005).

In our report we conjectured that the strength of, and effect of, such fear might be greater for smaller organisations, particularly those with no vested interest in facilitating access. We wondered whether away from the calming influence of the mutual support bodies like the Visitor Safety in the Countryside Group (VSCG, 2005) anxieties and misperceptions about the risk of liability for any eventualities that might afflict recreational visitors to their lands might have more power and effect.

This conjecture chimed with commentators who had previously noted that whenever changes are proposed to the legislative frameworks by which access rights are imposed upon property owners (most recently in England in the form of the coastal path right of access under the Marine and Coastal Access Act 2009) anxious landowners and their representative associations raise the spectre of civil liability towards injured recreational visitors as a key concern, and justification, for opposing the legislative change as presented to them. We found ourselves in agreement with Jones (1984), who, writing on the eve of implementation of the Occupiers Liability Act 1984³, surmised that:

“The refusal of access by country landowners probably has more to do with the depredations inflicted by the uncaring public, or an unbridled sense of proprietorship, than the fear of potential liability for accidental injuries” (726).

This paper reports on some of the further steps that I have taken to explore the relationship between landowners’ perceptions of their duties and liabilities and their approach to public

³ Which introduced a qualified duty of care to be owed to trespassers, in addition to the duty imposed by the 1957 Act for the protection of lawful visitors.

access to their land and premises. In doing so it will touch on the related themes of territoriality and proprietorship and delve deeper into the pragmatic and performative aspects of lay legal cognition. After briefly reviewing existing studies I will turn to consider a single-site case study warning signage at an urban-fringe pub. This empirical example raises some counter-intuitive questions (and possibly insights) into these processes.

2. Existing studies of occupiers' liability perception and exclusionary territoriality

The North American studies alluded to above (e.g. Teasley et al (1997), Gentle et al (1999), Wright et al (2002) and Henderson (2007)) centred their empirical enquiry around why, given that legislative concessions have already been made in order to insulate landowners against occupiers' liability for injuries sustained by recreational trespassers upon their land, landowners continue to express high levels of fear about potential liability. I do not have space to review this research in detail (see Bennett & Crowe 2008 for more), however Gentle et al's (1999) investigation of whether the different political and cultural heritage of various US States influenced landowners attitudes towards provision of access can help in summary. Gentle et al found no clear patterns other than a general finding that:

"Landowners are much more comfortable with the use of their land by friends and family, rather than by strangers." (Gentle et al 1999, 57)

and that a history of "unpleasant experiences with recreationists"(62), rather than socio-economic differences or differences between rural and urban fringe settings, were the most important influencing factor in landowners' decisions on whether or not to prohibit access to their land. Meanwhile Teasley et al (1997) found respondents giving a variety of reasons for prohibiting access to their land, many of which could be grouped under a collective heading of "keeping land private", with only 28% agreeing that their decision was in whole or in part "to protect me from lawsuits".

There has been little research in the UK upon the role of fear of liability in shaping landowners' attitudes to access and the ways in which they express their proprietorship. The limited UK research evidence found did suggest that fear of liability may be a much lesser influence than perceptions of privacy and control, for example a study of woodland owners' attitudes to access in the South East of England for the Forestry Commission (2005) found

that one third of private non-forestry business owners felt that their woodlands were important for personal privacy, with over 75% of this group reporting a perceived "loss of control" if public access was allowed. These privacy and control issues (which I take to be the core of 'proprietorship') showed more strength of feeling than whether liability for visitors was perceived as a factor of significance. In this regard none of the respondents reported "insurance claims" as a "very severe" problem, with 77% of the respondents reporting "no problems" in relation to this factor.

Our 2008 study explored the apparent disconnect between a prevailing public discourse that claims landowners to be fearful of the alleged compensation culture and landowners failing individually to rate fear of liability as a significant influence upon their land management practices in these studies. It appeared from the US studies that a more general anxiety related to proprietorship was being presented in public as a fear of liability, because that was a more publically acceptable discourse. Furthermore, we noted that the existing studies and anecdotal examples from access policy changes in the United Kingdom and New Zealand all suggest that expressed anxieties about landowner liability risk appear to amplify at times where the landowner community is experiencing the threat of change to access regimes (and/or other uncertainties).

Our study also highlighted the *approximateness* with which liability issues are perceived and invoked by landowners, and the ways in which other preoccupations and anxieties appeared to weave into their stances on access control. Understanding landowner liability perception therefore appears to require an understanding of this wider fear/anxiety and the circumstance specific nature of each landowner's understanding of, and response to, his legal obligations.

A number of commentators (for example Landry (2005), Bauman (2006), Philippopoulos-Mihalopoulos (2007)) point to the contemporary dominance of what might be called 'anticipatory fear' – a future focussed, risk assessment shaped, attempt to prescribe for the adversities of the (near) future. Commentators also note the ways in which such anxieties are (at least in part) constructed by those who suffer them (Wildavsky & Dake, 1990). For example, whilst a landowner may describe that which he fears as external to him and (and imposed upon him) there is a willed, selective, dimension, at least as regards the actor having decided either "*this is what I need to worry about*" or "*this is how I will explain my feeling of unease about public access*". In short, the likelihood is that if you get a landowner to think

about access issues he will do so within a narrative framework that makes sense to him in terms of his wider anxieties and tends towards telling you what he thinks you want to hear.

Accordingly, it may be no surprise that respondents to a survey by the Country Landowners and Business Association (CLA, 2007) aimed at raising landowners' concerns about the feared impacts of the Marine and Coastal Access Act's coastal 'right to roam' paraded the following colourful illustrations of contemporary folk devils: feared liability for burglars, doggers (and also dog walkers), paedophiles, vandalism, unexploded bombs, errant golf balls and the perils of coastal erosion. This list of worries testifies to the diversity of rural (and coastal) landowners and the myriad ways in which anxiety about a change in access legislation may be expressed in, amongst other things, the language of safety and liability fears.

The majority of our 2008 interviewees were large, pro-access landowners. A minority of bodies representing small and/or private landowners were included. The respondents largely said (in effect) "*we're not worried about liability; we take it in our stride. We manage the risk*". They then volunteered the following suggestions on what might make smaller landowners more susceptible to liability fears and consequential access restricting behaviours:

- 1) **Isolation and fear of liability.** It was felt that the more a landowner was connected into a support network in which a 'reasonable' approach to the understanding of liability risk could be collectively set and defended, the less the level of anxiety likely to be stirred up by sensationalist sources (e.g. the general media and its 'compensation culture' focus);
- 2) **Marginal survival.** That liability anxieties might be expected to be at their greatest where the business was (due to other pressures) struggling to survive, and access would be seen as 'something else to worry about'. In particular landowners with single site operations may be particularly vulnerable as they will not have the experience of adapting abstract legal requirements and applying them to the (inevitably) different physical circumstances;
- 3) **No gain from access.** That landowners with no direct (or indirect) benefit from the public and their access to their land might be less likely to feel comfortable;

- 4) **Something valuable to protect.** That landowners would be more concerned about access control in situations where the land or premises comprises valuable assets which could be stolen or damaged by visitors; and
- 5) **A prior history of bad experiences with public access.**

In the case study that follows I will refer to these collectively as ‘the Five Traits’.

Scholarship to date has observed a fairly rigid distinction between rural and urban investigations, with empirical studies of the control of recreational access to the countryside on the one hand and more theoretically inclined studies of urban enclosure processes on the other. In contrast to the land management focus of the countryside research, the urban studies have tended to focus either on “bunkerization” (Trigg 2008: 554) by homeowners or the grievances of those excluded from the land in question. The urban studies have not directly enquired into the legal cognition of non-residential landowners. Such studies have tended to focus on ‘gated’ residential communities and access control to shopping malls with these studies pointing towards that enclosure being driven by urban fears of crime and ‘others’ (see for example Low (2003), Sandercock (2005) Minton (2005; 2009) and Layard (2010)) rather than an owners’ fear of potential liability for the injury of members of the public who may access his land.

In reality much land lies between the extremes of rural idyll and dense city block. Indeed, as Farley and Symonds-Roberts (2011) note, the greatest level of contestation over day to day access to land may actually lie in the ambiguous “edgelands” – the car parks, urban-fringe fields and woodlands, wastelands and ruins at which neat and stable classification of such spaces as unquestionably ‘rural’ or ‘urban’ or exclusively ‘public’ or ‘private’ will often prove unworkable.

This paper therefore seeks to contribute towards breaking down this polarisation by studying a city-fringe premises, part of the grounds of a pub, as its case study point of focus and by drawing from both from the empirical tradition of the rural studies and the theoretical sophistication of the urban investigations in the following analysis.

3. Is there actually any story to uncover? – a case study

Our 2008 report recommended further research to specifically enquire into the ways in which individual landowners interpret occupiers' liability law and apply that interpretation to their day to day management of their land. This work is ongoing, focussed around individual sites and their owners.

The remainder of this paper will present a case study of one urban/rural fringe plot of land and its owner. The case study appears to question the Five Traits conjectured above. Whilst this paper cannot postulate rules or generalisations from one case study, an attempt will be made to interpret (and theorise) the case study's findings.

Looking back on our 2008 study I was conscious of the limitations of interviewing senior executives about their organisation's land management practice and decided that the follow-up work needed to be more 'micro' level and interpretive in its empirical focus. I need to understand how lay individuals come to understand the principles of occupiers' liability law and render them workable for themselves. In my view this (for present purposes at least) requires an open, exploratory research methodology, essentially a hermeneutic approach in which the researcher tries to see the world through the respondent's eyes, at least in so far as that is relevant to understanding how his perception of risks, liability and recreational visitors shapes his land management practices.

As part of my search for case studies in this vein I decided to approach and interview the owner-manager of an urban-fringe countryside pub which I have been aware of for eight years, and which during that time has passed through a number of different owners. This pub has a grassed area (which I will call "the Field"⁴). It comprises a small wooden fenced plot bordering the pub car park. It is generally level and contains a couple of old but functional wooden picnic tables. There are no obvious hazards in the Field. Yet I have observed that over the years each successive owner has sought to discourage the pub's clientele from using this area. During this time I have noticed ever-more cautionary signage appearing on the fence and gate that demarks the boundary between the pub car park and the Field beyond (Figure 1).

⁴ It was described by the Landlord as "the Paddock", although no horses have been there for at least 10 years.

Through my existing observational knowledge and face to face exploratory interview I hoped to explore with the current owner-manager (hereafter "the Landlord") why had he adopted the cautionary access strategy, his own understanding of occupiers' liability risks and what he based those views on.



Figure 1 - entrance to the field showing six cautionary signs affixed to fence and gate (April 2009)

Having regard to the 'Five Traits' I thought that the Landlord would be able to provide a conscious explanation of the signage – perhaps by recounting a previous accident in, or complaint about, the Field area which had set the whole process off. I also thought there might be some indication, in the Landlord's account, of safety/liability fears presenting as a proxy for a deeper set of proprietorial concerns (e.g. privacy and/or fear of loss of 'control'). I also anticipated that his approach towards the management of space at his pub would be consciously conditioned by external requirements derived from law (in particular premises licence, planning and insurance requirements).

4. So what *was* the story of the Field?

Well, there didn't appear to be a clear cut story so far as the Landlord could account. Whilst he echoed contemporary 'common sense' discourse about the self perpetuating nature of safety regulation and by expressing the view that we live in an era of increasing (and spurious) compensation claims he did not appear fearful of any such claims. He had had no personal experience of such regulatory intervention or claims, and appeared confident in his ability to manage people and situations through his own 'good host' nature (rather than stating an affinity for forms, barriers or notices). Neither 'insurer requirements' nor even the requirements of his premises licence appeared to have much effect upon how he shaped his approach to management of the Field. The Landlord did not appear to be haunted by a fear of his patrons and what they might get up to around his pub. Indeed he appeared to have a particularly optimistic worldview, appraising the likely behaviour of those who may come into the vicinity of his pub by reference to his own behaviour and dispositions.



Figure 2 - customer's eye view of fence signage (April 2009)

Yet despite all of this the Field was plastered with cautionary signs and disclaimers and gave every appearance of it being a place into which the public was not invited (Figure 2) and the Landlord's best account of his actions in 'closing' the Field was that the area was "untidy" and not somewhere that he would use himself at the moment. The signs were "just a risk assessment...just health warnings".

The following extract from my interview with the Landlord shows the inchoate nature of the Landlord's vague exclusionary territoriality over the Field. After describing the picnic tables in that area and its occasional use for themed events like Halloween and Bonfire night (the interview took place in February 2009), the interview continued thus (the numbers in brackets denote length of pause):

- | | |
|--------------------|---|
| Interviewer | so - you haven't got a problem with people going into that area? |
| Landlord | well I do have, at the moment, because it's, erm (0.2), it's (0.1) it's not how I want it (0.2) |
| Interviewer | in what sense? |
| Landlord | it's a bit untidy...because it's overgrown (0.2) and there's like pieces of wood about and it's not really ideal for, especially from this, especially from this time since Bonfire night, in the Winter, it's not really - I probably wouldn't use it... |
| Interviewer | so what about your signage up there, you've got quite a lot of signage up there? |
| Landlord | yeah, it's just a risk assessment, it's just health warnings, 'cause I don't really want like (0.2) anyone on there really, 'cause it's not (0.3) it's not ideal, I don't think, at the moment, well it's untidy, and it's not really ideal, I don't feel (0.1) and I'd rather use that, as and when it's like (0.2) as everything's perfect (0.2). |

5. Interpreting the story

It became clear in the interview that the Field is an area of the Landlord's pub that is not at the forefront of his mind or the forefront of his plans for his business. He would turn his attention to that area someday. Until then he'd written it off in his mind as "untidy" and not somewhere that he would want to go if he were visiting this pub as a customer. I felt that he regarded it as a "non-place" (Augé, 1996), in his mind, focussed as it is on building a viable business at this rather marginal location, it was (or at least he wanted it to be) 'out of mind', and because it was meaningless space to him he could not comprehend that anyone else might properly find that space desirable *at the moment*. Yet, for some unarticulated reason he felt compelled to reinforce the abandonment of that space by recourse to signifiers of risk and liability.

How can we account for this behaviour? If we reflect on the 'Five Traits' mapped out above the Landlord does not score particularly highly. The Landlord presented himself as a relatively laid back landowner, someone confident in his 'people skills' and steeped in the publican's service ethos. He had had no unpleasant experiences with public access in the past and the Field is of little current use to him (so his actions are not seemingly borne of a defensive urge). Yet, without conscious sense of exclusionary purpose, the Landlord has been routinely adding ever greater layers of cautionary signage to an unremarkable small grassed field.

I believe that the answer to this lies in the power of what had become *conventional* at this place. At a number of points in the interview the Landlord mentioned the inevitability and/or the business advantage of taking things on as they are - and not seeking to change everything from the start; for example:

"...Here you've got to be kid friendly where we are, in like the Tap Room you've got to be dog friendly: because **that's how it's always been**...so it's easy for me to come and say "I'm not having any dogs in there" - but it's not; **its part and parcel of this, the history of the pub I suppose**" (emphasis added)

This, in the spirit of Bourdieu (1987; 2005), suggests a form of *habitus*, an embedded physical manner of use of a place by its owner and its patrons which it is difficult - or unadvisable - to change. In business parlance this could be called ‘goodwill’, it is embedded history and knowledge that makes the place what it is. In that sense it is *cultural*, laying down a normative order to a place and encounters within it.

The story of the Field, such as there is one, may well be that the signified conditions of the Field (the signage and appearance of exclusion) have been inherited circumstantially from previous owners via the existing manner of physical arrangement of the property. There is no great thought behind it. It exists, remains and is added to because there has been no event or cause to alter that status quo or challenge its appropriateness.

At this pub this *habitus* appears primarily encoded and transmitted between successive owners through the physical arrangement of the place, for there was minimal induction of the Landlord by the previous owners on hand-over). The Landlord thus appears, via a process of “sedimentation” (Berger & Luckmann 1971, 85), to have added his extra layers of signage, recycling, repeating or adapting phrases inherited from his predecessors' notices (see Figures 3 & 4).



Figure 3 – Sept 2007 (before the Landlord's reign)



Figure 4 – Nov 2008 (during the Landlord's reign)

In this regard it is worth noting that the signs observed in 2007 (before the Landlord took over) are worded remarkably similarly to those installed in the era of the Landlord and furthermore that those signs, in 2011, still remain at the entry to the Field despite the departure of the Landlord and the arrival of yet another owner, who – presumably because he also has other more pressing things to think about – passively perpetuates the exclusionary effect of this accumulated layers of warning signage (Figure 5).



Figure 5 - May 2011 (after the Landlord has gone)

6. A pub's habitus; a publican's habitus

For Bourdieu habitus can reside in both places and people, and in both cases habitus is at least partially external to the local situation. Wider socio-economic (and other normative) influences will play their part in setting the *appropriate* dispositions for those people in that place.

If we return to the ‘Five Traits’ for a moment we can find in the socio-economic (and normative) context of the pub some potential pointers to factors that may have contributed towards this Landlord’s dispositions regarding signage and the Field.

The recent history of the pub industry is one of rapid (and externally imposed) structural change as Mutch (2000, 2001 and 2003) and Pratten (2007a, b & c) show. In 1913 95% of licensed properties were brewery owned (Pratten 2007a, 336) but during the twentieth century this domination progressively declined. The process accelerated following a Monopoly & Mergers Commission investigation in 1989 (MMC 1989) that led to large brewers being forced to cease brewing or release from purchasing tie half of the pubs that they owned over a national allowance of 2,000 each by November 1992.

This wave of divestment prompted the creation of new, smaller pub portfolio owning groupings (‘Pubcos’), many funded by investors from outside the brewing industry. As Pratten (2007c, 614) notes, since the early 1990s the pub sector has been subject to multiple waves of ownership change as banks, venture capitalists and entrepreneurs have regularly traded Pubco portfolios. The rising market share of supermarket alcohol sales and waves of legislative change such as the 2007 indoor smoking ban and the liberalisation of the hours of pub opening over the last decade have also contributed to the atmosphere of constant change within the sector.

Set against this sea of externally imposed change publicans have struggled to keep their pubs open. The restructuring of the 1990s and first decade of the present century saw marginal pubs either close or float out into independent, owner-run, ‘Free House’ status⁵.

We may conjecture that the co-ordination offered by an area and regional management structure for brewery owned or tied pubs may have operated in the past to reduce anxiety about liability risks within their outdoor zones and/or that, based on experience, publicans and their patrons did not need to be told what was and was not safe or acceptable use of the pub’s environs. However due to the intercession of Pubcos and increased Free House ownership, owners and managers drawing from their prior experience outside the pub

⁵ A ‘Free House’ is an establishment that is not ‘tied’ to a brewer and contractually obliged to purchase stock only from that sole brewer. The pub featured in this case study was, at the time of the interview, a ‘Free House’.

industry may have imported standards (or a sense of liability anxiety) characteristic of other industries, culminating in the installation of warning signs like those now visible at the case study pub and now embodied in this pub's ongoing habitus.

Mutch's work can also help us to think about the ways in which a *publican's* habitus is formed. Mutch's work confirms the Landlord's own biography and viewpoint – namely that publicans tend to come from publican families, they are likely to have little if any formal training for the job, some supervision may be exercised where the pub is owned by a brewery or similar but even in those parts of the trade the degree of directional supervision has been in decline. The modern way is to control (and incentivise) employed managers via their financial accountability rather than mandating controls over the spatial arrangement of the pub and its surroundings. Thus the trend has been towards leaving managers to make their own sense of what they must do to manage their pub.

However, the publican's freedom of action is tempered by the habitus of the pub itself. As Cavan (1966) and Pratten (2007 a) each show, a pub is a complex set of ordained spaces – often with distinct designated bar areas (the 'public bar', the 'tap room' and the 'lounge') each customarily assigned different decor, physical arrangement, customer expectations and behavioural norms. Add to that the temporal and activity-regulating aspects of the Licensing Acts and it becomes clear that running a pub is all about knowing how to respect and reproduce the 'expected' designation of times and spaces, and the control of activities and uses, within that place. Perhaps not surprisingly, the first place a new manager will look for guidance on what he must do, is the material culture and existing arrangement of the pub itself, as an embodiment of those normative codes and expectations.

So, in terms of the Five Traits, we find an industry sector built firmly upon habitus. An industry framed in unwritten tradition and an expectation of the publican 'learning on the job' yet now under siege from cumulative waves of recent externally imposed change and competition. Once understood in this light it will come as no surprise to reveal that the Landlord spent a lot of the interview alluding to difficulty he was facing in making his business venture a success. Talking about the Field, and asking him to account for how he was perceiving and managing liability risk for this 'non-place' must have felt perplexing to him. Despite my dogged line of questioning the economic pressures and uncertainties

continually interrupted during the interview. Within months of the interview the Landlord's venture was at an end, and the pub had new owners.

However, and in testament to the inertial power of the pub's habitus, this change of ownership wasn't easy to spot. The incoming owners made no changes to the physical arrangement of the place, the brasses, the games box, the tables, the ancient photos of the pub in times past, along with the Field's signage, all remained there, unaltered. In this pub, the owners come and go but the place, courtesy of its habitus, lives on unchanged.

7. What can this case study tell us about legal cognition?

Both the 2008 interviews and case study presented here were intended to illuminate the extent of (and techniques by which) landowners acquire and apply their lay understanding of occupiers' liability law. The outcome of these studies suggests that it would be dangerous to assume (as lawyers might well by training be tempted to do) that all landowners have a coherent understanding of occupiers' liability law and/or base their action upon it.

H.L.A. Hart (1994) sought to promote a 'sociological jurisprudence' which would pay serious attention to the effect of law as internalised by those subjected to it, an approach which sought an understanding of law's interpretation from the actor's internal point of view. This case study leaves me wondering whether Hart's rationalist view of the role of legal cognition in the shaping of lay pragmatic action in 'the real world' is too optimistic. For upon empirically enquiring into legal cognition and the law's subjectively received 'internal aspect' it becomes something rather nebulous, approximate and – to the lawyer's consternation – not as important as we like to think in the shaping of spatial activity.

As Andrews (2000) has noted (in relation to the ritual behaviours comprised in company directors' compliance with their disclosure duties under UK Company Law) what may actually be driving apparent compliance is a learned performativity, a ritualised behaviour, rather than an internalisation of the law itself. Thus just as company directors learn how to remember to fill in the appropriate forms, so landowners learn how to perform adherence to the conventional behaviours of territorial demarcation and risk management, but this is borne more of ritual than deep understanding of the law's conceptual doctrines.

Thus, when we look, we may find that law's concepts and symbols are deployed in day to day discourse in a distinctly approximate and incidental way. I find support for this viewpoint in two related strands of socio-legal scholarship.

First, the study of 'legal consciousness' in the work of Ewick & Sibley (1998) and Sibley (2005) which emphasises the dangers of assuming too close a correspondence between the law as extolled in juridical concepts and textbooks and the public appreciation of, adaptation to and application of, 'the law' in the everyday world. For them, law is an available schema, likely to be drawn upon pragmatically by citizens in order to make sense of their everyday lives, but it does not present a singular controlling code of living. Upon investigation law is commonly encountered as subordinate to other normative (and situational) influences shaping conduct.

Secondly, recent work within the 'Law and Geography' collaborative field, influenced as it is by the socio-spatial theorising of de Certeau (1988), Lefebvre (1991) and others, emphasises that 'the legal' and the spatial (and the socio-cultural milieu) are co-productive and that the focus of that production is pragmatic action. Thus territorial behaviour is a co-production of the actor's engagement with (and constraint imposed upon him by):

- i) the physical reality of the specific space;
- ii) the habituated and/or expressly known legal and other normative structures available to govern that space; and
- iii) the purpose of that action – it's circumstances and contingencies.

Delaney (2010) in support of this 'intertwined' reading of the production of places within human action, calls for "nomospheric investigations"(48) that strive to read the factors contributing to this co-production in a way that does not (through the conventions of rigid disciplinarity) privilege one contributory factor over any other. In short, the role of the law in this is important, but not omnipotent. It is in this spirit that I have sought to make sense of this case study. Hogg (2002, 34) encapsulates the required reorientation of the angle of analysis thus:

“if we were to take the spatiality of legal practices seriously ...we should cease to look upon law as a closed, formal and acontextual system and see it instead as an assemblage of heterogeneous elements, discursive, social and technical. These elements include distinctive physical structures, spatial arrangements and rituals as well as texts and rules.”

8. Why do the signs invoke the language of risk and danger?

This paper has sought to focus upon understanding the landowner's role in restricting access, and the possible ways in which the discourse of liability, risk or danger may be being invoked as a publicly acceptable proxy for proprietorship. The case study has taken us away from that question and has suggested that, in this pub at least, neither fear of liability nor proprietorship are the main drivers of this behaviour. We can, though find some insight into the role of a risk and liability discourse within the chosen signage.

Scollon & Wong Scollon (2003) and Delaney (2005; 2010) both seek to show the indexicality of expressions of territoriality. Delaney (2005, 30) shows how a ‘no trespassing’ sign alludes to, draws upon, and “implicate[s] complex relations of power” in that the sign invokes the apparatus of legal rights to which the landowner may potentially have recourse (not necessarily cheaply or with certainty) in order to control access to that territory. Yet the widespread persistence across the UK of exclusionary signs incorrectly declaring that ‘*Trespassers will be prosecuted*’ (trespass is not generally a crime in the UK and thus is more commonly a civil wrong for which the transgressor might be sued in the civil courts, rather than prosecuted in the criminal courts) is testimony to the approximateness of that invocation of the formalities of the law. Such signs create (and defend) territory as much by their normative appeal to moral and habitual (i.e. learned) notions of public and private space than to those signs’ (correct or incorrect) appeals to the authority of the law.

Such signage (and the appearance of exclusionary intent) also has an inferential dimension for the public. For signage to work successfully as an access control the public in the vicinity of such land must choose to take the warning signs in a conventional way, and not put the landowner to proof of their legal efficacy. The sign's audience must have either a habituated pre-understanding of how it is appropriate to respond in the face of such signs or alternatively those signs must spell out the rules explicitly. Thus the habitus of pubs shapes the way in

which these places, and encounters in and about them, are likely to play out. The signs will be noticed, but not normally read. In that sense it often doesn't matter what the signs actually say. Such notices are probably only attentively read by 'nomospheric technicians' (Delaney, 2010, 158) such as legal scholars with an over developed interest lay understanding of occupiers' liability law or claimant lawyers following an accident (Figure 6).



Figure 6 - How many customers would actually read this sign? (June 2008)

But why do the signs not simply say “keep out”?

Well, this may seem too brutal (or total) a prohibition given the ‘welcoming’ context that a pub will generally be expected to provide. Moore & Bottomley (2007) note the trend away from physical exclusion within city centre ‘privatised’ spaces, towards a more collaborative ‘governance’ based approach. Governance here is a term derived from Foucault (Lupton, 1999), which notes that the modern way of governing subjects is increasingly less achieved

through barriers, official violence or even direct imposition of law, but rather relies upon processes by which subjects are conditioned to respond to ever more subtle cues of control. The discourse of risk is a particularly ascendant ‘disciplining’ discourse (Landry, 2005). In short, using the language of risk and danger may be a particularly contemporary, polite and effective way to achieve access control.

The fundamental point with the Field is that the landlord cannot currently conceive of any *other* usage for that space. He would not want to go there (as a customer), he is not currently ‘providing’ that space (in the sense of offering it as part of his commercial realm). It is presently meaningless to him (but has the potential for meaning in the future). He needs to symbolically nullify it, to take it out of the picture and to deal with it ‘later’. Yet he expresses that in the ‘modern way’ via the language of risk allocation and the persistence of inappropriate or mutated signs, that testify to a general deterrence, rather than a specific warning / thing of danger or an outright foreclosure of this space.

This process reveals an aspect of territoriality that may not seem obvious – something that Sack (1986) describes as ‘space clearing’. Sack describes this form of territoriality in rather abstract terms, but with the case of the Field we can see that territory can be a willed nullity. The Landlord has no current use for the space. Perhaps he can see some potentiality in it, but for the time being it is surplus to requirements.

As Sack (1986) notes, territoriality may be a relatively cheap and effort free approach to managing a spatial problem (in this case a spatial surplus). It is easier to deter the public from an area by affixing a few mildly unwelcoming signs than spending the time to render it “tidy”. And to extend the analysis here, it is easier for the Landlord to deter via a sign that invokes law, risk and danger (because people are more likely to take notice of that sign) than it would be to erect a sign that says (as might have been more accurate):

“Please don’t enter this area because I’ve not had chance yet to get it how I want it to be, and I’d prefer it if you would use and enjoy the other parts of the pub that I have spent time and effort getting to a state that I’m proud of and I want you to enjoy”.

Remember here that the Landlord appears not to have any particular danger in mind other than ‘untidyness’. For him (if conscious at all) the role of the signage is to help keep the Field off his list of things to worry about. It needs to be symbolically declared a ‘non-place’ *for the time being* whilst he focuses on trying to develop the pub’s core spatial zone (the pub’s bar rooms and its contiguous courtyard). The Field now lies beyond that spatially shrivelled core, it’s ageing picnic tables a legacy of a previous expansionist era at this pub, an era during which – these remnants would suggest - an unsuccessful attempt was made to commercially colonise this marginal zone.

Here we see the creation of *waste-land*, a process of neglect underscored by a low-thought, low-cost, low-effort technique for declaring it empty and (in a commercial sense) not currently part of the pub. Yet, all the Landlord has to do is declare it a temporary ‘Beer Garden’ on special occasions and it springs back into being as a willed part of the pub. Moore & Bottomley (2007) have noted the increasing blurring of any rigid distinction between ‘public’ and ‘private’ space – instead spaces become multifunctional. Thus the Field is neither ‘private’ nor ‘public’ in any static sense, instead it fluctuates and the borders that it sets up are porous because of the commercial imperative (and potential of the Field on occasion, and perhaps more so in some indeterminate future) to be a space of commerce. In such situations the Field can become (both physically and symbolically) ‘opened for business’.

Altman (1975) defines such places as ‘secondary territories’, places characterised by the ambiguity of their access status, due to their being neither for all time nor in all circumstances unequivocally ‘private’ nor ‘public’ space. These are places into which the public may enter *sometimes*. The rules of *sometimes* are complex and may need spelling out in notices and declarations of express conditions of access if the habitus of the place does not create clear normative guidance. Yet, perhaps ironically (as we have seen) the signs themselves can – via sedimentation - subsequently become ‘locked’ within the pub and publican’s habitus, they become part of the ‘normality’ of the pub and its physical arrangement.

Significantly, at this place, the local habitus does not appear to provide a clear framework for the *removal* of this signage. Instead it is left to accrue and the visitor must make their own sense of these notices. Most will vaguely notice these ambiguous signs, but will not stop to read them. They will ascribe to them a general prohibitory intent and not venture into the Field. This seems to be consistent with what the Landlord wants – but (as we have seen) his

sense of proprietorship over this area is currently weak and this space is controlled by circumstance, rather than by conscious direction on his part. There is no cynical exclusionary strategy here. Instead the process plays out by default. Here these signs themselves control space, control visitors and – in the sense of habitus explored above – also appear to exert some control over the successive owners of this place.

My best guess is that this process was set in hand a number of years ago under an earlier owner's initiative. When I first became aware of the Field in 2002 there were vestiges of a rather rudimentary 'adventure playground' in the Field. The 'take care for your children in this place' trope may have been, at that time, specifically directed to then non-standard feature of this space (and reflect the anxiety and legal interventions around child safety in playgrounds that was at the fore in the late 1980s as chronicled by Ball (2002)). The sign shown in Figure 7 may therefore represent the 'root' meme (Dawkins 1989: 192) of this now rather self-perpetuating semiotic rash, for this (long broken) printed sign suggests a more specific and slightly institutional origin than the 'home-made' paper offspring now accompanying it.



Figure 7 - The root meme? (Nov 2008)

9. Conclusion

My experience of trying to interpret this case study has forced me to examine the limitations of a traditional ‘legalistic’ approach to investigating both proprietorship and legal cognition.

A visit to the pub would give the impression that the Field is a small area in comparison to the footprint occupied by the pub building and its courtyard. But in preparing this paper (and trying to find out what had happened to the Landlord) I obtained a copy of the title plan from the Land Registry and was surprised to see that the Field is almost exactly the same size as the pub and its courtyard. As Korzybski (1933: 58) has noted in a different context: “The map is not the territory” but it does usually capture at least part of its essence. The title plan shows that both areas are held under the same registered land title, and subject to the same covenants. Yet for the Landlord one part of the title (the pub building) is the anxious commercial focus of his working life whilst the other (the Field) is a surplus, ‘non-place’ barely noticed by him. A conveyancer reading these title documents would get no sense of the differential level of dwelling with which these two parcels are currently invested. The symbolic manipulations of the Field and its flip flop in and out of an actively possessed and enjoyed state registers little, if at all, at this formal level of title.

Yes, physical possession via occupancy and use is an important feature of proving and sustaining ownership, but as Gray and Francis-Gray (1998) and Grear (2003) note, the notion of ownership at common law is conceptually muddled and the legal rules of possession would pay little heed to the subtle totems of nullification and non-place making identified in this case study. For these are matters of something non-legal: differential degrees of dwelling (in the sense of a space being loved and thought about, or not).

To understand proprietorship – and its effect upon access control - we have to take a more holistic approach and follow Delaney (2010), Hogg’s (2002) and Trigg’s (2005) exhortations, and move away from interpreting land use solely through the disciplinary gazes of either law or spatiality, because focus on only one dimension will miss some of the story. Instead, Delaney recommends a holistic scholarship that should seek to study how:

“...nomic traces are provisionally inscribed and anchored to segments of the world. Participants in social situations, whether routine or extraordinary, avail themselves of such traces as they see pragmatically relevant to the tasks at hand (the right to exclude

in order to... the right not to be excluded in order to ...). Traces such as rules or rights are not simply free-floating bits of discourse. They are spatialized signifiers that may be deployed as reasons or justifications for acting this way or that, one way or another.” (Delaney 2010: 60 – emphasis in original)

The accumulated signs at the perimeter of the Field are such “nomic traces” (Figure 8). In part they perpetuate because of the inertial effect of the pub’s habitus and the dispositions that that engenders in successive publicans (and patrons) who come to the site (and this may be amplified by structural adversity such as recent history of the pub industry). On occasion they are the results of actively willed behaviour, whether deployed pragmatically towards specific ends by the landowner (e.g. declaration of Beer Garden events) or are imposed by some external event or requirement (e.g. playground safety standards or the indoor smoking ban).

But in all of these circumstances the shaping influence of the law is enacted (it is performed by a succession of owners and their respective patrons) via approximate and intertwined notions of law and liability, territoriality, proprietorship, embodied custom (i.e. habitus of the place, its owner and patrons) and feelings and dispositions about a place. This is a complex cocktail that requires us as lawyers⁶ to step into a wider frame of analysis if we are to understand lay perception (and pragmatic use of) the law and the contribution of the law in shaping how premises are used and managed.

Clearly, a single case study cannot prove or disprove that a conscious anxiety about liability haunts other landowners, or that such behaviour is really a mask for a rawer sense of proprietorship, but it is hoped that the analysis set out in this paper offers some pointers to techniques, levels of analysis and disciplines to be engaged in the pursuit of this question.

⁶ Similarly (and following Delaney 2010) the geographer (or other social scientist) reader should equally take heed not to ignore the important constitutive role of the law in the construction of the pub, the publican and his patrons via matters of title, leasehold and planning obligations, premises licences, brewery ties, anti-monopolistic restructuring, public health controls, fire ordinances, occupiers’ liability, insurer requirements and employment legislation to name but a few.



Figure 8 – Decaying signs left as nomic traces, legacies of prior action yet still operative (May 2011)

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