

Landowners' liability? is perception of the risk of liability for visitors accidents a barrier to countryside access?

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Landowners' Liability?

Is perception of the risk of liability for visitor accidents a barrier to countryside access?

Literature review and scoping study

Final Report

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Lynn Crowe - Professor of Environmental Management

September 2008



**Sheffield
Hallam University**

SHARPENS YOUR THINKING

EXECUTIVE SUMMARY

Introduction

A number of studies have been commissioned by various public agencies and interest groups across the UK in recent years to interpret (and then publicise) what the level of liability risk actually is in their jurisdiction in relation to landowner liability for visitor safety in the countryside (for example SNH (2005); VSCG (2005); DOENI (2007)).

Such analyses have provided legal opinions on what the law actually requires, based upon evaluation of existing legislation and case law. These studies have characterised landowner liability risk as low.

However studies such as SNH (2005) and DOENI (2007) have also noted that landowner perception of the level of liability risk appears, for some reason, to be over-stated.

Our research question

This study focuses upon available evidence about how liability risk is perceived by landowners (as potential access providers) and the public (as potential claimants). The primary focus is therefore not to re-examine what the law and liability position is - but rather to consider how each group may perceive it to be: and what effect (if any) that perception has on access.

Scope of this project

Our work presented in this report comprises a literature review of available research, case law, policy and commentary on this theme, together with a scoping study involving telephone interview of a sample of landowners and representative bodies (21 in total). The respondents were selected to give a spread across each of England, Wales, Scotland and Northern Ireland.

Existing research

There has been little research in the UK upon the role of fear of liability in shaping landowners' attitudes to access. The limited UK evidence that we have found suggests that fear of liability may be a much lesser influence than perceptions of privacy and control. Our report reviews US studies and an anecdotal example from New Zealand which suggest that expressed anxieties about landowner liability risk may amplify at times where the landowner community is experiencing the threat of change to access regimes (and/or other uncertainties).

Key findings

1) The conformity of landowner liability risk and perception across the UK

This study has found that the actual level of landowner liability risk is low, and of an equivalent level in England & Wales, Scotland and Northern Ireland. There are

subtle differences in the format and focus of the occupiers' liability and/or access legislation in each jurisdiction, but these do not appear to result in a difference in the level of risk faced by landowners in terms of the way that the courts of each jurisdiction apply the relevant liability principles.

Landowners' perceptions of liability risk appear broadly comparable across the three jurisdictions - anxiety appears presently slightly higher in Northern Ireland, and may be rising somewhat in England. In Scotland the focus appears more sober and pragmatic - reflecting the fact that the access regime is now largely in place, and current dialogue concerns matters of practical implementation, rather than the fundamental debating of principles which evidently ran long and deep in the run up to the implementation of the Scottish "right of responsible access".

In each case we take the degree of evident concern about landowner liability to be a reflection of current debates regarding access themes: namely, concerns about a National Park designation in Northern Ireland and the current policy consultation regarding the proposed coastal path access requirement in England. Current focus within Scotland is around the ongoing process by which access authorities (councils and National Park Authorities) draw up a "core path plan" for their area.

Across the jurisdictions the issues of tree inspection standards and livestock straying related accidents appear to be key issues of current focus for landowner liability anxiety.

Divergence of perspective on landowner liability was found to be more (non-statistically) significant between the relative size of landowner / scale of access than in relation to any evident difference of liability or access regime between the four UK jurisdictions.

ii) The role of culture in forming anxiety about landowner liability

The perception of landowner liability is also influenced by more general social and cultural trends. Our report describes the emergence over the last ten years of a general anxiety that a "compensation culture" and a "risk adverse society" are forming within the UK. Our report also identifies the emergence of a strong consensus amongst senior policy figures that steps must be taken to counter this anxiety. This resistance has found formative expression in the influential and forceful House of Lord's judgement in the Tomlinson -v- Congleton Borough Council case in 2003.

Most commentators on "compensation culture" conclude that there is no objective evidence to substantiate the view that claims are increasing. Indeed annual rates of successful accident claims registered by the UK Government's Compensation Recovery Unit (CRU) show that between 2000 and 2005 the overall number of registered accident claims fell by 5.3%.

None of our scoping study's respondents reported a significant rise in visitor accident claim rates - indeed many respondents were able to recall only a few (<5) claims across their organisation during the last 5 years.

However, a fear of liability is said to persist despite these clear policy and judicial signals.

We identify a number of factors that appear to contribute towards this lingering anxiety:

- widespread ignorance amongst lay communities about how the law operates;
- a realisation of the inherent uncertainties and unpredictability of the law by those who have some acquaintance with it; and
- tensions regarding the impact of access legislation amongst private landowners.

The 21 telephone interviews conducted as part of this scoping study reveal anecdotally that landowner liability fears are not significantly impacting upon recreational access provision within the community of large, access-remit, multi-site public agencies who formed the core of our scoping survey group. In these organisations a systemic and professionalised approach to health and safety and access management renders visitor safety a mainstream operational management issue. In this community, peer networks help to form common understandings of what should be taken as a "reasonable" level of safety. A number of formalised peer networks such as the Visitor Safety in the Countryside Group, the Water Safety Forum and the Tree Safety Group were identified. Such groupings appear to have had a particularly formative influence upon the "benchmarking" of safety standards - and to have contributed to a palpable sense of reassurance amongst the respondents.

Our scoping study focussed primarily upon the perceptions and practices of large public sector bodies. The perceptions and practices of private sector landowners were dealt with indirectly, via enquiry of representative farming and rural business associations. With one exception, we did not directly investigate individual private landowners' perceptions. However our study found some indirect evidence to suggest that, in contrast to our survey group, private landowners (who do not have an access-remit or a professional safety management culture and who have less direct experience of legal and public policy processes) may be considerably more vulnerable to an over-stated risk perception of landowner liability risk. We offer views in this report on why a difference in risk perception might be present - but on current evidence we can neither prove, nor disprove, the existence of such a distinction in the UK. Given the absence of any pre-existing studies on this, we recommend that whether such a heightened risk-anxiety exists amongst private landowners (or distinct communities within that wide class) requires specific investigation. Such future analysis would also need to examine whether any heightened anxiety (if any) in such communities actually results in greater denial or withdrawal of recreational access to their land.

There is also some evidence that industrial owners of open land (e.g. quarrying companies) may have specific anxiety that recreational incursion to their land will expose them to a greater risk of regulatory enforcement or liability (and/or

otherwise hamper productive exploitation of their land). For similar reasons this also requires specific investigation.

We find local authorities to occupy a "middle position" between the extremes of calm control (public sector agencies with access-remit) and certain sectors of the farming community who exhibit nervous uncertainty. Whilst local authorities may be likely to exhibit a considerable degree of sophistication in their managerial arrangements for safety management, there is a perception that some councils may be vulnerable to cultures of fear and a "knee jerk" reaction to perceived liability risks. We consider that investigations to build upon the type of work undertaken by Gibbeson (2008) would improve understanding of the factors that may prompt individual local authorities to adopt extreme readings of risk in relation to places or activities regarding by their peers as "reasonably safe".

iii) Is there an actual effect upon access?

It appears to be a common assertion that fear of liability is adversely affecting countryside access provision. However we have found little concrete evidence to prove that landowners are actually behaving in a risk-adverse manner in response to their liability anxieties.

In particular we have found no direct evidence of a withdrawal of access to countryside land due to a fear of visitor safety liability. We have identified a number of press reported instances of extreme risk-adverse land management behaviour. However, on closer investigation these examples often cease to be clear-cut instances of an excessive defensive approach to access and liability management. There is usually a more prosaic explanation underlying the scenario. Because of this there is a need for development of a stronger evidence base from which to evaluate the impact (if any) of landowner liability anxieties.

What needs to be better understood?

Our literature review has found little existing UK based research on the landowner liability theme. Our small scoping study has identified certain cross-UK parities, and appears to indicate divergence in the level of anxiety between different types of landowner.

Further field research to develop an evidence base against which the tentative conclusions offered in this report may be further tested is recommended.

In particular, understanding how the various landowner communities form and articulate their perception of liability risk is, we believe, crucial to determining how best to engage with and address those anxieties. Impressive work has been done by a number of public agencies to produce lay guides aimed at reassuring private landowners that the access and liability regimes do not intend or threaten an increase in actual liability risk. Access advisory posts within key stakeholder bodies have also received public funding from bodies such as Scottish Natural Heritage with the aim of working within communities of private landowners to raise awareness of the real (low) level of landowner liability risk. However, to our knowledge, no studies have been carried out to establish the degree of

penetration of such messages, how the communities themselves interpret those messages, and whether their view on landowner liability is accordingly altered by presentation of such guidance and assistance. Audience research may help inform future targeted campaigns, particularly if (as suggested by some of our respondents) expressed concerns about safety liabilities may actually be indicative of deeper anxieties, and framed in informal and local ways that are not readily accessible by written guidance or reassuring pronouncements of senior judges, academics, politicians and other public policy figures.

We set out in Chapter 7 recommendations for further research to directly investigate these issues, focussing upon three core elements:

- **Private landowners** - Investigate how private landowners perceive landowner liability risk - and how best the reality of the actual (low) level of risk might best be communicated to that community;
- **Visitors** - Investigate what recreational visitors believe to be a landowner's level of responsibility for their safety - and to identify what factors influence a potential claimant's decision about whether or not to bring a compensation claim against a landowner in the event of a recreational access related accident in the countryside; and
- **Public sector** - Investigate why some local authority, NGO and public agency recreation and land managers may perceive a heightened risk of liability compared with their peers in other similar organisations. This would entail focussed investigation of organisational culture within a sample of such bodies, with the aim of identifying how liability perception and anxiety are transmitted within organisations down to grass roots / front line staff. It would also examine how those organisations (and the individuals within them) find and form the "balancing points" between the competing objectives of ensuring safety and facilitating recreation.

Acknowledgements

We would like to thank the Countryside Recreation Network members for commissioning this study and the respondents who gave us their time and support. During the interviews the respondents consented to us naming them in this report. The respondents provided their views as private individuals, rather than as representatives of their respective employers. Responsibility for the content of this report lies solely with the authors. The opinions and interpretations set out within this report are those of the researchers and do not necessarily represent those of the project sponsors, the Countryside Recreation Network, or of any member organisation of the CRN.

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A caveat

As will be evident from our report - the law is dynamic with a rapid pace of change. Any study can only consider its subject at a particular moment in time. Accordingly readers should note that the case law and legislation referred to in this report reflect how the law (and its practice) stood in July 2008.

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1. INTRODUCTION

1.1. The commission

Sheffield Hallam University was commissioned in March 2008 under the aegis of the Countryside Recreation Network, to undertake an initial desk study concerning the perceived influence of fear of liability upon landowners in relation to making available or promoting access to their countryside land for recreation (in this study termed "*landowner liability*"). Specific funding for the project has been provided by the Forestry Commission, Northern Ireland Environment Agency, the Scottish Government and Sport Northern Ireland.

Please note that the expression "landowner liability" is used in a broad sense throughout this report as a reference to liability (or fear of liability) by owners and occupiers / managers of land for access related accidents.

1.2 Project aims

The project aims were to:

- identify existing research or commentaries that are relevant to this issue;
- gather views of landowners, stakeholders and insurers via limited telephone interviews;
- interpret and describe relevant policy, legal and sociological insights and initiatives upon why perception of the risk of landowner liability and its reality do not appear to correspond;
- consider available commentary upon visitors' own perceptions of responsibility for safety in the countryside, and the factors that influence whether or not a compensation claim is likely to be brought against the landowner;
- present examples of perspectives, perceptions and risk-averse land management in response to the perceived risk of landowner liability; and
- make recommendations for further research.

1.3 Personnel

This study (literature review and telephone interviews) was undertaken and written up by Luke Bennett, a Senior Lecturer in Law within the University's Built Environment Division. Prior to joining the University in 2007 Luke practised for over 15 years as a specialist in safety and environmental law, advising a number of major landowners on landowner liability. At appropriate places the direction and

findings of the study are informed by Luke's own direct experience of industrial landowner anxiety about landowner liability.

The project was managed by Professor Lynn Crowe, a countryside access specialist, and responsible for the management of the Countryside Recreation Network (CRN) secretariat at Sheffield Hallam University.

1.4 **Methodology**

The project comprised the following (broadly sequential) elements:

- internet and academic database searches to identify materials for review;
- review of CRN and other stakeholder publications;
- review of academic and policy literature concerning "compensation culture " and "risk society";
- review of recent case law concerning UK courts' approach towards recreational accidents, the law of negligence and landowner liability;
- review of Government policy on the landowner liability aspects of access;
- research on the impact of the Health & Safety at Work Act 1974, in particular with reference to the Health & Safety Executive's standpoint;
- review of a selection of non-UK policy and academic publications concerning landowner liability in other English speaking common law based jurisdictions (principally United States and New Zealand); and
- telephone interviews (21 in total plus one response via email) with the following:

No.	Respondent category
7	access officers within public sector agencies with access responsibilities
5	health & safety managers within public sector agencies with access responsibilities and the water industry
3 (+ 1 email)	private country landowner representatives
2	countryside visitor attractions
2	local government land / risk managers
1	insurer
1	health & safety litigator (solicitor)

these interviews were arranged initially with managers nominated by the project funders - however following these initial contacts a second wave of respondents were then contacted via "snow ball" (i.e. onward recommendation). The interviewees were approached in advance by email, and sent details of the areas that we wished to discuss with them. Telephone interviews then took place at agreed times in a semi-structured manner, to enable fully exploratory enquiry. The interviews lasted between 30 minutes and 80 minutes, depending on how much time the respondent wished to spend working through the questions.

1.5 What is "the countryside"?

It should be noted at the outset that this Report does not exclude all mention of urban access and liability issues. Whilst the project's subject of study is countryside access it has been considered helpful to draw upon contemporary debate (and research) upon urban access, safety and risk. Indeed, the relative paucity of existing "rural" research into these themes requires this wider perspective.

Also, we would argue that drawing a rigid urban / rural distinction distorts reality, and our perspective is encapsulated in Haworth's (2004, p4) observation:

"If wild lands are defined as areas in which human influence is negligible and cities as areas entirely constructed and managed by humans, then these two form environmental extremes between which exist a multiplicity of open living spaces. These vary to a large extent by the degree of management and residence imposed by humankind."

Accordingly this study must take into account the diversity of land types that may be regarded as "countryside", ranging from urban fringe through to the truly wild and remote from urban influence.

1.6 What is "liability risk"?

"Liability risk" is a type of operational risk, it is defined as:

"uncertainty related to financial responsibility arising from bodily injury (including death) or loss of wealth that a person or an entity causes to others." (Skipper & Kwon 2008, p22)

The concept of "risk" now has a fairly wide currency. In technical terms it means the probability of a hazard arising and causing harm. Physical features at countryside sites may pose physical safety hazards, and the "risk" that persons may be harmed is a matter of calculating how "likely" that harm is to arise, having regard to factors like proximity to visitors, physical condition and effectiveness of existing management arrangements.

"Liability risk" is something at one stage removed from physical hazards - it is about evaluating the likelihood (i.e. probability) that if an accident were to occur it would lead to a successful compensation claim (or prosecution) against the landowner. This study is about how the public and landowners appear to perceive liability risk in relation to countryside access.

A number of studies have been commissioned by various public agencies and interest groups across the UK in recent years to interpret (and then publicise) what the level of liability risk actually is in their jurisdiction in relation to landowner liability (for example SNH (2005); VSCG (2005); DOENI (2007)). Such analyses have provided legal opinions on what the law requires, based upon evaluation of existing legislation and case law. These studies have characterised landowner liability risk as low. These studies have also noted that landowner perception of the level of liability risk appears, for some reason, to be over-stated.

However, how "liability risks" are actually perceived by landowners and the public, (and how that perception shapes claiming and land management behaviour) has not itself been directly studied in the UK. This study attempts to map out a basis for an understanding (and subsequent investigation) of this dimension.

1.7 Structure of this report

This report sets out the study's findings as follows:

- **Chapter 2** examines the social, legal and policy context in which contemporary fear of landowner liability is situated. It does this by exploring themes of "claims consciousness", "negligence" and "uncertainty". It explores why the perception and the reality of landowner liability do not always correspond.
- **Chapter 3** surveys the emergence in recent years of a strong policy backlash *against* risk aversion - and in doing so flags the potential for a future reduction in landowner liability anxiety.
- **Chapter 4** maps and seeks to interpret the continuing impact of landowner liability fears in the minds of the public, managers and landowners by reference to the wider policy trends and themes examined in Chapters 2 and 3.
- **Chapter 5** seeks out to identify concrete examples of landowner liability fears upon access provision within published policy and academic works.
- **Chapter 6** sets the findings from our semi-structured telephone interviews with our stakeholder sample group.
- **Chapter 7** offers a conclusion and recommendation for further research.

2. "COMPENSATION CULTURE" - THE PERCEPTION AND THE REALITY

2.1 Introducing "Compensation Culture"

"Changes in the law and its enforcement and the growth of a blame and claim culture put extreme pressure on land and property managers. In response managers have, all too often, introduced excessively rigorous safety regimes that spoil the visitor's experience, or even closed access altogether." (VSCG 2005, p4)

Our literature review has found some evidence of a perception amongst landowners that a "compensation culture" has arisen within the UK during the last decade, and a related perception that the risk of landowner liability is getting ever greater as more and more sections of the community start to see their world from a litigation-minded perspective. However our interviews have found a lower than anticipated level of concern about these factors. In part, this may reflect the public sector and sophisticated (i.e. knowledgeable) orientation of the study sample. The findings of our survey are discussed in Chapter 6.

In this chapter we outline the myth and reality of the "compensation culture" concept, and look at the ways in which the law - in theory and in reality - approaches accidents involving visitors to land.

2.1.1 Compensation culture - the perception

During the 1990s steps were taken streamline the civil justice system, and to improve "access to justice". The 1990s also saw the rise of Claims Management Companies (CMCs). It is these developments that are seen as the cause of a "compensation culture" in the UK.

During the 1990s In order to improve access (and to reduce the burden of the cost of finding litigation via the (means tested) Legal Aid system) the UK Government allowed lawyers to introduce Conditional Fee Arrangements (CFAs). A CFA allows lawyers to offer claimants a "no win, no fee" cost structure. In the event of a claim being unsuccessful the cost of instigating the claim is covered by insurance, but if the claim is successful then the lawyer is permitted to claim an inflated "success fee" as part of his remuneration (and the defendant will be liable to pay all or most of this, in addition to the compensation sought).

Then in 1999 the civil justice system was comprehensively overhauled by the "Woolf Reforms". These reforms introduced a streamlined body of procedures for civil claims, by which the express intention was to accelerate cases and to produce an equivalence of power between the claimant and the defendant.

CMCs are companies who tout for potential claimants (in particular in daytime television adverts and run down shopping centres) and then introduce their customers to solicitors for a fee. Some see this activity as a form of "ambulance chasing", and embodying a litigious mindset historically more characteristic of the US than the UK.

Furedi (1999) illustrates the dramatic growth in the power of CMCs by quoting an assertion by Claims Direct, that between its founding in 1996 and early 1999 it had settled 2,600 claims, representing a total payout value of £8Million.

The rise of CMCs in the 1990s was a follow on from the commercialisation and commoditisation of solicitors' personal injury litigation services following the relaxation (in 1984) of the rules that had previously prevented Solicitors from advertising.

Furedi also notes the contribution of an emerging "rights" based discourse during the 1990s, such as the "Citizen's Charter" and consumer rights advocacy, to the rise of a "*politics of claims making*" (Furedi 1999, p23).

For Furedi the rise of a "compensation culture" is fundamentally anti-social and corrosive:

"A most damaging consequence of the culture of compensation is its impact on human relations. It promotes suspicion and conflict and directly undermines relations of trust and the sense of personal responsibility."
(Furedi 1999, pii)

2.1.2 An increasingly risk adverse society?

Closely related to the concept of a rising "compensation culture" is a belief that society (perhaps as a consequence of this perceived increased exposure to a risk of litigation) is becoming increasingly "risk averse". As one commentator describes:

"We live in a world where safety is a moral absolute, and where pro-safety arguments have accumulated into vast dunes that roll across the landscape burying all in their path in suffocating hummocks of regulations: farmers and recreators become embroiled together in common suffering, until the only people left free to live normal, slightly risky lives are rugby-players and celebrity adventurers." (McDonald 2004, p21) - a New Zealand countryside access campaigner

We consider the impact of the perception of the rise of a "risk adverse" society in the next chapter.

2.2 The reality: are things actually getting worse?

2.2.1 What the figures show

A Parliamentary inquiry in 2006 by the House of Lords Select Committee on Economic Affairs (Parliament 2006, p4) found:

"no clear evidence to support the view that a compensation culture has developed."

Most commentators on "compensation culture" conclude that there is no objective evidence to substantiate the view that claims are increasing. Indeed annual rates of successful accident claims registered by the UK Government's Compensation Recovery Unit (CRU) (which recoups social security payments from claimants who have successfully won their accident claims) show that between 2000 and 2005 the overall number of registered accident claims fell by 5.3% (and in the same period claims against local authorities, schools, volunteering organisations and other public sector bodies reportedly fell by 7.5%) (Blair 2005).

However this statistic can give no insight into the level of unsuccessful claims or those claims which are settled outside the court system - and there does appear to be some evidence to support a view that there has been some degree of rise overall in claim making (LGA & Zurich 2004).

Indeed a study by the Environmental Law Foundation of the impact of the "compensation culture" upon the British Trust for Conservation Volunteers, the Woodland Trust and the Forestry Commission (ELF 2005) found some evidence of an apparent upward trend claim levels in the BCTV and the Forestry Commission (but no particular trend in relation to the Woodland Trust).

However more remarkable than the relative upward trend was data showing the very low number of claims brought. For example ELF report that for the three year period 2002 to 2004 only 23 visitor safety claims were made against the Forestry Commission (during that period the Commission's estate enjoyed 150million visitors). The majority of those claims were broadly of a "slips and trips" nature, with sprains and broken bones as the most common injuries - for which the level of compensation award would be relatively small (circa £5,000 to £10,000) due to the absence of long term impairment and loss or earning potential. In addition ELF report that BCTV considered that the majority of claims made against it were spurious - with only 10% proceeding to the issue of court proceedings.

In an unrelated publication (Probert 2006) it is reported that the Forestry Commission logged 106 visitor accidents in the year 2002-03 (with 110 and 131 in the two previous years). This suggests that the accident / claim ratio is equivalent (at around 10%) for the Commission. Probert also suggests that the number of visits to the Commission's estate may be considerably greater than that stated by ELF, as he reports an estimate of 120million visits per year.

The figures related to the number of court proceedings issued and/or successful claims show only the tip of an iceberg. Many claims are settled by insurers without emerging as formal claims registered in the court system.

Caplan (2007) points to evidence that the Woolf Reforms have increased the pressure upon parties to settle their disputes before reaching a formal trial - this is achieved via the structuring of the civil litigation system, with its strict timescales and stage based case reviews. Mediation and other forms of informal dispute resolution have increased.

Caplan notes that the biggest impact caused by contemporary trends in civil litigation may actually be the rapidly increasing legal (and other procedural) costs

incurred in personal injury litigation. Quoting Association of British Insurer figures for costs payments by UK motor insurers for bodily injury claims, Caplan notes that these costs have risen by 840% over the last 20 years (increasing 9.5% per annum between 1996 and 2006).

A recent study by the Health & Safety Laboratory (a branch of the Health & Safety Executive) set out to understand why rates of reported "slips and trip" accidents have shown no decrease in recent years despite a greater awareness of those risks and how to manage them (HSE 2007). In its study the HSE conjectured that the lack of decrease may be a product of rising claims, spurred on by the "compensation culture". The investigation focussed upon the retail and manufacturing sectors only. Through a combination of qualitative and quantitative investigation of the perceptions of lawyers, premises managers, insurers and the public the HSE offered up the following findings:

- employers are recording and reporting (to the HSE) more accidents as self-defence against the threat of possible litigation - rather than there being a rise in actual accident occurrences;
- the subject industries are seeing costs increasing because average payouts have increased - not because the number of accidents has increased; and
- the (perceived) peak of claims was 3 to 5 years ago.

The HSE study included telephone interview enquiry of insurers (sample number not stated). The following insight into insurer's experience and perception of claims emerges from that study:

- there has been a 10% reduction in public liability claims during the last 10 years;
- the claims statistics show the "compensation culture" to be a myth;
- people may be reporting accidents more - but they are not increasing dramatically - claims numbers have increased by 2-5% annually;
- there is now less stigma in claiming - it has become more acceptable, backed by an "I'm owed" mentality;
- frivolous claims are in the range 5-10% annually;
- few cases go to court - if the claim is clear cut then it will not go to court. If the event has occurred and been reported the claimant's likelihood of success is 80-90%. But without evidence the success rate is low;
- 98% of slips and trips cases are settled outside of the courts;
- claim patterns show regional variance - with the North West and Northern Ireland having notably elevated levels; and

- 40% of slips and trips falls come from employees, 60% from the public.

It is important to appreciate that the vast majority of accident claims are road traffic accidents or accidents at work. Only a small percentage concern "public liability" (i.e. non RTA accidents involving members of the public) - and only small fraction of those accident claims would appear to relate to visitors to the countryside.

We will look into the available information on the cost impact of accident litigation upon landowners in later chapters.

2.2.2 Why accident and claims statistics are only part of the picture

However figures can also be used to show a reality to public perception of the existence and rise of a compensation culture.

In a study commissioned by the Department of Constitutional Affairs to investigate the effects of advertising by compensation claims agents, the survey team found that 66% of those sampled believed that:

"a lot more people are receiving compensation payments for personal injuries now [in 2005] than they were five years ago [i.e. in 2000]." (Millward Brown 2006, p40)

We will argue in this report that the perception of a "compensation culture" is a powerful shaping force, that can affect the way in which access to land is managed, regardless of whether that perception is accurate or not.

As Burgess' investigation for the Countryside Commission of amplified risk perception of the risk of attack in urban fringe woodland (Burgess 1995), and its corresponding effect in suppressing woodland usage showed:

"what is perceived to be real is real in its effects."

In other words:

"The compensation culture is a myth; but the cost of this belief is very high." (BRTF 2004).

2.3 The fundamentals of occupier liability law

Another area in which perception and reality appear to diverge is in relation the principles of liability under civil and criminal law for accidents suffered by visitors to land. We outline the principles of the applicable law in this section - and also look at how the theory and practice of liability correspond.

Here we must start by distinguishing criminal and civil law liabilities. As Genn notes in relation to claimants (but a point we suspect is equally applicable to many landowners):

"A clear message that emerges from the study is...the pervasive lack of the most rudimentary knowledge about legal rights and procedures for enforcing or defending rights" (Genn 1999, p255)

Studies frequently show considerable ignorance about principles of law and liability in the lay community (which, for our purposes, means considerable potential for misperception of what the risk of liability actually is for accidents sustained during recreational access). That ignorance is a feature of both the visitor (i.e. potential claimant) and land owner and manager.

In particular, these lay communities have a muddled perception of the realms and relative importance of criminal and civil law. Characteristically this results in members of the public (i.e. visitors) tending to have an image of law based around criminal processes, whilst land owners and managers (if they have a background in asset management) will tend to view law (and the risk of liability) as a matter of civil liability (i.e. contractual relationships and duties of care owned (or not owned) in the law of negligence). However landowners in industrial and other closely regulated industries (e.g. mining and quarrying, water and the mechanised aspects of farming) may tend towards focussing upon the risk of criminal liability because of existing experience of regulatory engagement or enforcement in relation to operational and occupational health & safety affairs.

This fractured understanding of the nature (and types) of liability at stake in a landowner liability context are reinforced by the fact that the legal profession tends to specialise lawyers into either criminal or civil work - therefore the way in which legal advice on landowner liability would be framed and focussed is often influenced by the particular specialism of the lawyer who is retained to advise.

It is not the aim of this report to set out a detailed summation of occupier liability law across the UK - however, in following the theme of the importance of perception (and mis-perception) in the formation of (potential) claimant and landowner understandings of the level of safety liability imposed upon land owners and managers, it is necessary to summarise what each strand of the law (civil and criminal) expects. We then move on to consider the uncertainty factors that go some way to undermining the clarity of what we have summarised as the core features of the applicable law.

2.3.1 What the law expects - criminal law

The criminal law sets absolute duties concerning harm to humans - it is unlawful to intentionally kill or injure (without informed consent) and it is unlawful to cause harm by extreme carelessness. Also, with the enacting of the Corporate Manslaughter and Corporate Homicide Act 2007 it becomes possible for a public or private sector organisation to be prosecuted for manslaughter where a death results from a gross failure in its management system. Previous attempts to prosecute organisations (rather than individuals) for the common law offence of manslaughter had rarely succeeded because of the need at common law to be able to identify particular individuals as having culpability, and thereby by their acts having caused liability for their employer. The Act applies (with minor variations to reflect differences in general law) across the UK, and came into effect on 6 April

2008. Despite the local variations in each jurisdiction the effect of the law in each jurisdiction is to set an equivalent liability threshold.

There is also the Health & Safety at Work Act 1974. This sets a framework of safety duties for which criminal liability arises if they are breached. The Act's requirements apply not just between employers and their employees - but also apply to employers and persons in control of premises and places used for their business or other activities. The 1974 Act applies in England, Wales and Scotland. Equivalent provisions are in force in Northern Ireland via the Health & Safety at Work (Northern Ireland) Order 1978.

The basic duty imposed, is a requirement that places (and activities carried out there) must be safe and without risk (and if that is not reasonably possible then those places must be rendered reasonably safe, having regard to the circumstances). Accordingly a form of cost / benefit balancing is in principle acknowledged within this law.

The 1974 Act represented a sea-change in the structure of UK Health & Safety law. Prior to 1974 a succession of Factories Acts had sought to impose a prescriptive safety regime upon defined industrial activities and machinery. The philosophy of the 1974 Act was to move away from mandated standards - and to empower employers (and premises owners) to make their own informed judgements about how to achieve safety within their own premises. Accordingly an implicit "risk assessment" (and risk management) philosophy was introduced.

Another influence behind this change of approach was the realisation that the British economy was changing - and that a focus upon regulation of factory type activities would fail to address safety in modern forms of business activity that do not occur within such "traditional" settings (e.g. the leisure sector).

The shift towards a "risk management" framework was further underscored in 1992 with the implementation of the European Community Framework Directive on Health & Safety. This resulted in a number of new UK regulations which explicitly used the language of risk assessment and risk management, and required business and place owners to pro-actively appraise and "manage-out" risk within their projects and places, and to document the steps taken to ensure this. Key regulations of this type were the Management of Health & Safety at Work Regulations 1992 and the Construction (Design & Management) Regulations 1994.

These developments prompted an evolution in the health and safety management - the focus moved away from shop-floor foremen as compliance checkers to more senior managerial roles for safety managers and system planners, and their language and processes of risk management over time came to permeate UK management culture. In short, health and safety became professionalised within large organisations.

2.3.2 What the law expects - civil law

In parallel to the mandated requirements of criminal law regarding safety, the civil law imposes responsibilities (a "duty of care") upon land owners and managers. Via this doctrine of negligence (and its close relation, nuisance) where the duty applies land owners and managers must take reasonable care avoid the person to whom the duty is owed coming to harm by the landowner's or manager's actions (or omissions) in relation to their land.

Failure to exercise an adequate standard of care towards a person to whom a duty is owed will lead to liability (to pay compensation) to the injured person, provided it can be shown, on balance, that the landowner's failure to take adequate care was the cause of the accident.

The related doctrine of "nuisance" imposes duties upon landowners for the adverse effects of natural or man-made features that are present upon their land, and which cause harm or annoyance to their neighbours or visitors.

The part of the law of negligence that addresses the duty and standard of care owed by landowners is known as "occupiers' liability". Since the Second World War legislation has been enacted in the various UK jurisdictions to modify the principles of negligence in this area. This means that, in contrast to the criminal law requirements, occupier liability law has different expectations in each jurisdiction. In summary, the position is as follows:

- **England & Wales** - A distinction is drawn between the level of standard of care that is imposed upon visitors who have permission (whether express or implied) to be present (Occupiers' Liability Act 1957) and trespassers (i.e. those without such permission) (Occupiers' Liability Act 1984). Whilst reasonable care must be taken to provide for the reasonable safety of visitors, a lesser standard of care is imposed to protect trespassers - the duty only requires trespassers to be protected against known dangers (and then only if the likely presence of trespassers at such features is likely and it is reasonable in the circumstances to offer them protection from that hazard). In addition, unlike the duty owed to visitors, the duty owed to trespassers only relates to avoidance of bodily injury, there is no responsibility to avoid damage to their possessions.
- **Northern Ireland** - An equivalent regime applies to that described for England & Wales, however the source legislation is different: the Occupiers' Liability Act (Northern Ireland) 1957 for visitors and the Occupiers' Liability (Northern Ireland) Order 1987 for trespassers.
- **Scotland** - Scots Law draws no distinction between visitors and trespassers. The Occupiers' Liability (Scotland) Act 1960 requires that an occupier has a duty to take reasonable care to make sure that people entering the land which is under their control will not suffer bodily injury or damage to their possessions.

In all cases the occupiers' liability regime provides for a concept of "consent to risk" - namely that liability may not arise where a visitor has given informed consent to a risk of injury or damage to his possessions. The doctrine is most applicable to adults - the regimes expect occupiers to have greater regard and intervention in relation to the risk of children being attracted to and/or harmed by hazards upon their land.

2.3.3 Access legislation and occupiers' liability legislation

The introduction of different recreational access regimes within Scotland and England & Wales in recent years has further differentiated the occupiers' liability principles applying in these two jurisdictions:

- **England & Wales** - The Countryside & Rights of Way Act 2000 introduced a "right to roam" over certain countryside land (namely open country, dedicated Access Land and registered common land). The 2000 Act amended the 1957 Act to state that a person exercising the right to roam will not be deemed to be a "visitor" (for the purposes of qualifying for the full protection duty imposed by the 1957 Act). Instead the duty to such access-takers would be the lesser standard of care set (for trespassers) by the 1984 Act. Furthermore, the 1984 Act's duty was itself curbed in relation to such persons - as the 2000 Act amended the 1984 Act to provide that occupiers of accessed land would owe no duty of care to access-takers in relation to natural features (which is defined broadly to include potentially man-made features such as ditches, ponds and vegetation) or access to the land via any route other than a gate or stile.
- **Scotland** - The passing of the Land Reform (Scotland) Act 2003 introduced a "right of responsible access" to all countryside land in Scotland, as part of a fundamental modernisation of land ownership law in that jurisdiction. This more extensive access right was framed upon the basis that (Section 2(1)):

"A person has access rights only if they are exercised responsibly"

This expressly introduces a concept of reciprocity (i.e. that both the owner and the access-taker have responsibilities in relation to access) and introduces a notion of personal responsibility upon the access-taker for their own actions. These principles are fleshed out within the 136 pages of the Scottish Outdoor Access Code (SNH 2005b).

- **Northern Ireland** - In contrast to England & Wales and Scotland, Northern Ireland has not experienced a modernisation (or expansion) of its access regime. Access to private land in Northern Ireland remains oriented around rights of linear passage along a limited number of public rights of way, permissive paths and some de facto toleration of recreational access to open land. Accordingly the status of the Rambler in Northern Ireland will sometimes (for the purposes of determining which standard of care applies) be that of a trespasser and therefore the duty of care owed will be equivalent to that set by the 1984 Act in England & Wales - but without the

further restriction of liability for natural features and improvised means of access added to the 1984 Act by the 2000 Act for the reassurance of landowners in England & Wales. That means that in Northern Ireland a landowner could potentially be held liable for an injury suffered by a person on his land which was due to a natural feature or an improvised means of access. However this liability situation existed in England & Wales for 20 years prior to implementation of the 2000 Act - and there is little evidence that the level or success rate of visitor accident claims was altered in England & Wales by that legislative change.

2.3.4 Livestock and liability

Mention should also be made here of civil liability for the escape of animals. Whilst the source legislation differs between the jurisdictions (i.e. the Animals Act 1971, Animals (Scotland) Act 1987 and Animals (Northern Ireland) Order 1976 respectively) the liability that is imposed upon livestock owners is equivalent. Livestock owners have "strict liability" for injury or damage caused by their livestock, no negligence needs to be shown. Accordingly the integrity of physical structures aimed at keeping livestock under control (e.g. gates) and the potential interference with such structures by access takers is a particular point of concern for farmers. We explore the specific risk and perception of liability in relation to livestock later in this report.

2.3.5 Does recent access legislation increase occupiers' liability?

It will be appreciated from the above descriptions that each jurisdiction has sought to avoid increasing the risk of landowner liability. This has been expressed either by declaring that the access legislation has not altered the status quo (the approach in Scotland) (see Fox 2005), or (in the case of England & Wales) by further *restricting* the situations in which a duty will arise under the 1984 Act. As noted above, the equivalent of the 1984 Act applies in Northern Ireland in un-amended form - but there is no evidence of this effecting the actual level or success rate of claims in comparison to England & Wales. Indeed it appears that these subtle legislative differences may in practice be largely ignored by the courts - with the anti-liability principles expressed by the House of Lords in the English case Tomlinson v Congleton Borough Council (2003) UKHL 47 holding much sway across the UK, at least in relation to adult recreational injuries suffered upon open land. The Tomlinson case is examined in Chapter 3.

The frameworks of occupiers' liability therefore expressly seek to address the risk that access legislation might increase the standard of care (or the community to which duties of care are owed) beyond that which already prevails - and an attempt is also made in that legislation to acknowledge the inherent hazards present in the countryside.

The liability rules attempt to offer a role for consent (i.e. voluntary risk taking by visitors) and to make it clear that signage (or other form of warning) may be sufficient to discharge the duty of care owed. The law also requires focus upon differential risk awareness within the population (e.g. special care for children).

2.3.6 Conflicts between policy priorities: "*public risk*"

There is however an inevitable tension between safety and preservation of aesthetic and cultural purity of the "natural" countryside. In part, this is because an element of risk (or at least uncertainty) is an essential component of countryside recreation.

Marsh (2006 p4) captures well the dilemma facing access managers, as a requirement to:

"...pull off the "con trick" of balancing the need of visitors to feel the unrestrained freedom that is essential to the countryside experience...while in reality we secretly try to manage their activities within tight legal and corporate parameters".

This challenge can be illustrated by the example of Hawkstone Park in Shropshire, a Grade I Listed landscape comprising rugged cliff paths and Eighteenth Century follies, a landscape described by Dr Samuel Johnston in 1774 as:

"By the extent of its prospects, the awfulness of its shades, the horrors of its precipices, the verdure of its hollows, and the loftiness of its rocks, the ideas which it forces upon the mind are the sublime, the dreadful and the vast. Above is inescapable altitude, below, is horrible profundity." (Johnston 2000)

The owner's website describes the attractions on offer thus:

"Highlights include Grotto Hill, where you can explore a pitch-dark labyrinth of ancient mines cut into the cliff; the Swiss Bridge, a rustic wooden structure perched over an unnervingly deep chasm; the Cleft, a path winding between two cliffs which narrows into a dark, creepy tunnel; and the Monument, a 100ft high column which can be climbed to enjoy panoramic views of up to 13 counties!" (Hawkstone 2008)

Thus, risk is not just an unavoidable feature of this landscape - the identity and experience of this landscape is forged by its element of risk. As Roger Whitehouse, the Park's Head Warden, says:

"The park brings back a wonderful sense of mystery and adventure from your childhood. You never quite know what's around the next corner. You can take your time and let the kids run about. Children love the Park and Follies. It's not a place where they are entertained in a controlled way, like a museum, but somewhere they can explore and use their own imaginations. Each child gets something unique from the experience." (Hawkstone 2008)

Yet, Hawkstone Park has to find a point of balance between preserving this quintessential terrain whilst providing an adequate level of safety compliance - and accordingly the park is not without its fair share of safety signage, visitor induction and pathway inspections. Inevitably such signs warn of hazards ahead, removing

(or at least reducing) the stated pleasure of "*never quite know[ing] what's around the next corner*".

The park, like all other visitor attractions must strive for an acceptable level of balance between preserving "authentic" experience, adequate safety and sustainable expenditure.

Visitor safety in the countryside is a "public risk" theme. public risk is concerned with activities (or states of affairs) that present both (actual or potential) costs and benefits, matters for which seeking a "nil-risk" outcome may be unfeasible, or even harmful given the costs that would need to be incurred and/or the benefits that would have to be forgone. Public risk is about how stakeholder debates can be instigated to build consensus around rational balances between costs and benefits. We will see in the next Chapter how debates around public risk have recently significantly influenced political and judicial perspectives upon where the point of balance should be set in relation to countryside access, safety and personal responsibility.

2.4 Law's inherent uncertainty

But can the law give a clear steer about where this balance point should be set?

Law (whether criminal or civil) is an abstraction. It is a system of generic rules that tries to set down a generic framework of conduct to govern an infinitely variable range of physical circumstances and human encounters. The law is always distant (in both place and time of application) from that which it seeks to control. In short, the law (whether legislation or the pronouncements of the courts) is an approximation to reality - and "law in practice" (how people, via their own understanding of the law) will often mutate away from what may originally have been intended. There will always be uncertainty, grey areas and examples of inconsistency and eccentric application of the founding principles of any particular subject area of the law.

Yet in our rational age, where cause and effect must be understood, people expect order to be either present in (or imposed subsequently upon) an incident. As Rowe notes:

"Chance does not exist in a Just World." (Rowe 2005, p18)

In this section we will look at the various factors that affect how and why this re-creation of the law occurs - and its relevance to perceptions of landowner liability risk.

2.4.1 The diversity of visitors and places

In the countryside, in particular, the infinitely variable range of physical circumstances and human encounters is pronounced. Access is taken by all sorts of people, for all sorts of reasons and in all sorts of ways. Widely different levels of experience, risk awareness and risk tolerance are present. Places and their level

of risk are infinitely variable (and vulnerable to unpredictable external influence, such as the weather or the playing out of natural processes like rock falls).

The legal principles, when applied to the countryside, struggle often to find a comfortable point of balance between the "safety", access and concepts of inter-personal responsibility (as expressed in criminal sanction / compensation rights).

2.4.2 Why is liability uncertain?

The lawyer's job is to predict (and if engaged in litigation, then to influence) the way in which a court will interpret a set of circumstances - and apply the law to it and thereby reach a view on whether or not A is liable to B (and if so how much).

The aim is to "think like a judge" - and in doing so to either:

- advise a client in a way that renders the client's actions compliant and/or adequately careful (and therefore avoid liability); or
- steer a claim (or a defence of one) successfully so that it is settled to his client's satisfaction without ever reaching a trial.

But, like the lawyers who seek to prejudge them, judges often find themselves facing issues that have not been addressed before (or only infrequently) - an observation that is particularly applicable to countryside access given both the recent introduction of new access legislation and the low level of reported case law on occupiers' liability (in contrast to the sizeable body of case law dealing with occupational accidents and road traffic accidents).

Eventually judges have to make subtle decisions about how to weigh the competing priorities of the law and the evidence before them. That process is influenced by a variety of external impressions and influences upon the judge - not all of which would be readily apparent (and predictable) in advance either by the judge himself, or those who may seek to second guess his interpretation.

Judges and lawyers are shaped by their own perceptions of law and liability - and these will not necessarily reflect what the legislators (or previous judges actually intended). This creates an inherent uncertainty as to how the law will be applied on any particular occasion.

Such processes also bring "hindsight" to bare - judgments are made about conduct (and its adequacy / legality) in a sober and considered way that is likely to differ greatly from the circumstances of the accident to which the case relates (e.g. sudden event, chaotic circumstances, imperfect information, focus on practical incident management rather than abstract analysis of legal duties and defined standards of conduct).

There is also the fact that litigation (whether criminal prosecution, civil claim of Coroner's inquiry) is individually focussed - the subject matter is (say) the death of someone, at some place for some reason. The lower courts are rarely invited to consider wider issues. Each case is decided upon its own facts. Few cases are

reported (only the higher court cases are systematically reported and published). In short, when comparing cases similar facts can be determined differently.

In negligence cases judges have fair amount of discretion in their "discovery" of the law and their application of it to the facts of the case before them. As Furedi (1999) notes negligence law has "creep" tendencies - new areas of claim (and success) emerge over time as witnessed by the rise of psychiatric shock cases, sports injury litigation and "abuse in care" cases in recent years.

2.4.3 How is "reasonableness" actually interpreted?

Both occupier liability law and the health & safety law require employer / place occupier to do that which is reasonable in relation to the provision of safety. Whilst the Health & Safety Executive, trade associations and other groupings provide interpretations of what they regard as "reasonable" provision in defined circumstance the ultimate choice is left to the duty holder (with the risk that they will be judged with the benefit of hindsight if something goes wrong).

In judging "reasonableness" the courts will look to evidence presented to them - perhaps some expert witnesses to testify to the mechanics (i.e. causation) of the accident and (possibly) some witnesses to attest to what "best practice" passes for in the activity in question. But ultimately it is a judge who has to decide whether what was done was indeed reasonable (i.e. sufficient).

Arguments of "public risk" and "public benefit" do not sit well with the individualised focus of the courts - to argue that 100,000 people have enjoyed an unfenced beauty spot without injury would rarely overtly influence a junior court into deciding that the harm suffered to the 100,001th visitor was therefore "reasonable" (and therefore acceptable) given that context. Ball (2002) notes that, in theory at least, existing HSE guidance on risk assessment acknowledges that the *benefits* of the activity (and the risk inherent in it) should be taken into account for the purposes of determining whether a risk is of a type or extent which the law requires to be managed - yet in reality are often disregarded by quantitatively minded safety engineers because the benefits are qualitative, value driven judgements which are not amenable to proof.

The junior courts do not like having to rule on what is acceptable as a residual level of (tolerable) risk / lack of safety, and have tended to equate the existence of an accident with evidence that the management of safety was therefore insufficient.

The criminal courts have, in particular, set themselves against the use of "cost - benefit assessment" rationalisations where they perceive them to be evidence of an employer "putting profit above safety" (for example, R. v F Howe & Son (Engineers) Ltd [1999] 2 All E.R. 249 Court of Appeal).

At a grass roots level, the lower courts will often take quite a conservative approach in forming their view upon what is "adequate" - the forum will not be well suited to "public risk" type arguments. This can mean that claimants have a higher chance of success with their claim in the junior courts (where all claims must

commence). This will be because those courts will not concern themselves with the wider "public policy" implications of their judgement. However where defendants appeal against a junior court's decision to the higher courts (e.g. Court of Appeal and potentially thereafter to the House of Lords) - something that costs a significant amount of money and which requires permission for appeal to be granted - the prospects of a claim being overturned becomes higher, because these higher courts will be more prepared to take into consideration the wider implications of their decision.

However this complex, long winded and inherently uncertain process may leave landowners with the wrong impression of landowner liability. A landowner may hear a local report of the junior court's judgement and therefore learn that a claim had succeeded, without being alerted subsequently to the fact that on appeal that ruling was eventually overturned and the claimant actually walked away with nothing (and may also have been landed with responsibility for paying the landowner's legal fees for defending the case).

2.4.4 Interrelationship with guidance and "good practice"

"Good practice", "best practice" and "reasonable care" are all concepts that are inherently uncertain - in any case each side will pick and choose from the available documentary and expert witness evidence in order to construct a version of practice which best suits their position. Each rival view may be perfectly rational judged on its own terms - but each will be based on different input assumptions (for example, how generically or specifically the activity in question should be framed - is the site in question a swimming pool, a lido or "the UK's only outdoor aqua adventure centre"?).

Ball (2002) also notes the way in which liability structures tend to focus upon the person who makes the land or other facilities available - rather than the user, and of the way in which courts reify whatever advisory document that they can find (even if "advisory" rather than mandatory) and judge the provider's conduct against that yard stick regardless of (i) the behaviour of the user or (ii) the uniqueness of circumstance:

"One problem appears to be that safety is perceived in some quarters as the sole responsibility of the provider and that if something happens it is necessarily attributable to inadequate provision. The problem is compounded by court experts who can all too easily find an advisory document which in some way or another has been breached." (Ball 2002 Section 8.3)

Ball also notes that "good practice" varies from stakeholder to stakeholder - it does not exist as objective fact (unless codified within mandatory legal standards). "Best practice" is a value laden concept, a construct, yet it tends to be treated by the courts as something more stable and beyond debate.

Ball (1995 p4) draws a link between the need for reaction (and lesson learning from an incident) and a structural predisposition towards ever greater tightening of safety levels:

"Sooner or later a [claimant] will inevitably succeed in winning a case on however dubious grounds, and this, because of the pressure to conform or to be as good as the "best", would then become a trend-setter. This phenomenon, known as "ratcheting" by industry, leads inexorably to ever more stringent safety measures, irrespective of cost or logic."

2.4.5 The private realm of claim settlement

Whilst the process of legal interpretation involves "thinking like a judge" few cases will ever actually reach a court, and therefore ever actually be determined by a judge.

The vast majority of claims are settled out of court - by some estimates (Pearson 1978) as few as 1% of claims reach the UK courts, and of those only a small fraction will find their way into the higher courts (e.g. in England & Wales the Court of Appeal and/or House of Lords) and get reported in law reports. Therefore only a fraction of a fraction of cases ever get fully debated by senior Judges and form part of the Judges' lofty role as interpreters (and guardians of) this part of the "common law". Indeed it is likely that nowadays at least 85% of claims are disposed of without commencement of formal legal proceedings (Crane 2006 p208).

Therefore most claims are settled "in private" - and accordingly we don't know how the law is being applied in "routine" (i.e. non-contested) claims. Insurers may choose to settle some debatable claims because it is cheaper to do so than to incur the expense of fighting them. The role and influence of insurers in setting the response to a perception of "compensation culture" is of critical influence.

Much of the "sense making" around issues of "what is the applicable law?", "how much care should have been taken?", "what precautions should have been taken?" and (most importantly) "is there liability?" are exercised by lay and junior lawyer personnel in what Furedi (1999, p47) styles the *"shadow legal world"*.

How law and liability principles function at that "day to day" level has been little investigated. But practical experience suggests that administrative factors (sheer burden of case work), financial targets and resources and public relations policies must influence the decision upon whether or not to fight a claim at least as much as erudite considerations of the finer points of law and the ragged boundaries of negligence law.

One must assume that in their "day to day" claims management and settling work, insurers and their advisers develop and apply their own "rules of thumb" as to what constitutes reasonable (and therefore "good") practice, so as to determine whether a claim would be likely to succeed (or will be more costly to defend or to pay out) if it went to court. And if it is judged likely to succeed then it is likely to be settled (i.e. paid) rather than proceed to court to be formally investigated there.

Whilst there have over recent decades been some studies that have attempted to investigate claims behaviour by the public (e.g. Harris et al (1984), NCC (1995),

Genn (1999) and HSE (2007)) there have been no corresponding surveys of how defendants or their insurers deal with claims (or the fear of claims). However, as Harris et al (1984, p99) suggest:

"...it is intuitively likely that the strategy adopted by insurance officers will depend largely on their assessment of the same factors which a claimant must weigh."

This is because each party in the litigation "game" must appraise the strength of the other side's position - and then plan its settlement or defence strategy accordingly. Therefore an assessment of the strength of the claimant's case and his ability to sustain a fight (a question of resources and stamina) are key considerations. But the insurer will also have other drivers - these are cultural and institutional and may bare no relationship to the particular claim or claimant in question. Accordingly, factors such as the following will also have their role to play:

- questions of precedent - is there a danger that settling a claim will encourage a flood of similar claims?;
- public relations (both with the public at large and with customers);
- budgets and workload; and
- relative cost of fighting vs settling (aka "nuisance value").

Also, as Harris et al (1984, p100) note, there is an asymmetry between insurers and claimants. To claim is an exceptional and unusual step by a claimant. It is an individual action - whereas the receipt, management and resolution of claims is the insurer's core activity and knowledge. The emotional (and significance) investment by the parties to the dispute (potentially with the landowner trapped somewhere in limbo in the middle) is of significantly different order. Insurers can be very dispassionate and abstract in their approach to a claim. For them each claim is a very small piece of a much larger picture - the totality of their claims. That global picture is interpreted by actuaries, the individual circumstances of each claim having little significance overall to the insurers understanding of the "*risk landscape*" (a concept developed by the Better Regulation Commission (BRC (2008) p10) for which his insurance is written.

2.4.6 The function of negligence

In concept the law assumes that its role is to regulate behaviour, and to uphold individual rights by expressing blame and censure. However, as Crane (2006) and Furedi (1999) both note, in reality the functional primacy of negligence as a method of allocating responsibility (i.e. blame) has long since given way to the operation of negligence as a system of compensation, in which allocation of personal responsibility and "blame" is very much a secondary, and subordinated, factor.

As Harris et al (1984, p18) note:

"...the basic philosophy of the judge-made law on the tort of negligence is individualistic: the law seeks a justification for compelling one individual (the casual agent) to pay compensation to another individual (the victim) and finds it in the concept of negligence."

Viewed in this way, the focus of claiming and case handling by the junior courts can be seen as a "means to an ends" (a contrivance) - the finer points of what the law says are actually secondary to a more instrumental question: namely, viewed in the round "is this claimant deserving of compensation?" (rather than "is this defendant at fault?"). In this way accident litigation has become depersonalised - it is a means to an end; and in the end it will be the insurer who pays (most) of a successful claim, not the party found to have been "at fault" in the law of negligence.

It should be noted however that the strength of influence of insurers will not be the same in every landowner organisation. Many public bodies (and some local authorities) are "self insured" (which means that they do not hold insurance cover, they meet claims directly from their own reserves) whilst many large organisations that do have insurance cover have large "deductible" levels which may mean (for example) that they are required to meet the first £10,000 of every claim from their own resources, with the insurance only paying out any liability in excess of that amount. This means that for most "slips and trips" claims an insurer would not be meeting any part of the claim.

However where public liability insurance is held the risk management profile (and in particular the previous years claims) of that organisation will be a matter of scrutiny by the broker when negotiating insurance cover (and the level of premium) for the forthcoming year. A high level of claims would push the cost of insurance up in future years.

2.4.7 Outrage factors cannot be eliminated

But whilst it is important to appreciate the instrumental nature of how many negligence cases may actually proceed within the legal system - it must also be acknowledged that "outrage" factors also play an important part in how law and liability develops over time. This is particularly true of accidents involving children. In this regard the introduction of a licensing regime for adventure centres via the Adventure Centres (Young Persons Safety) Act 1995 was a direct response to the public outcry following the deaths of four teenagers during a supervised sea canoeing activity in Lyme Bay in 1993. Following that incident OLL, the company providing that activity and its Managing Director, Peter Kite, were both convicted of manslaughter for failing to provide adequate safety for that trip.

2.4.8 Fear of litigation is debilitating

Fulbrook, in his 2005 study of the impact of negligence claims against school trip and outdoor activity organisers, surveys the cases involving civil and criminal litigation around this theme. He is able by his detailed review of each case report to show that whilst the cases in question may have been reported in the media as symptomatic of the worst excesses of a risk adverse society and/or a

compensation culture, the evidence actually presented in each case tended to show clear circumstances of poor planning or execution of such activities. In short, he concluded that these cases merited legal action. They were not instances of a "runaway" litigation frenzy. However Fulbrook's analysis also shows that a general perception arose that any error by a teacher or other trip arranger would lead directly to prosecution and/or a compensation claim became deep rooted - seriously deterring schools and teachers from arranging such activities.

Indeed, a single case can create a sense of anxiety in a professional community where one had not existed before. For example, the conviction of a local authority facilities manager following a fatal legionnaires disease outbreak in a leisure centre in Cumbria in 2002 sent a shock wave through the facilities management industry, as the then president of the Chartered Institute of Building Services Engineers noted in 2004, contextualising his new experience by reference to another perceived risk group:

"It is one of the many liabilities that almost all of us has that we're barely aware of when we take up a post...this is similar to the sudden realisation by teachers of their liability for taking children on school trips."

It is ease with which such anxieties can "move sideways" and replicate across traditional boundaries that is a hallmark of our "liquid" modernity (Bauman 2006).

Little research has been done within organisations about how this perception of risk (and its general sense of anxiety) trickles down within an organisation as part of corporate culture, and why collective anxiety about such matters will be greater in some organisations than others of equivalent size and sphere of activity. We return to this theme later in this report.

3. EMERGING PUBLIC POLICY TO COUNTER "COMPENSATION CULTURE"

Any accident, whilst an event in the sense that something will have happened, is subjected to an interpretation - as to what actually happened, who caused it, who should have prevented it happening?, is it blameworthy?, what is an acceptable level of risk?, did the victim consent to his own risk of injury? There is no single "correct" interpretation of such an event in any objective sense - and interpretation will be "socially constructed". But the significance of an interpretation either reached by a court (or reached by parties in anticipation of how a court would interpret the scenario) is a powerful subjective interpretation - because that interpretation determines whether any compensation is payable (and if so, by whom).

The way in which the law is written, interpreted and applied (and the policy and cultural winds behind it) are crucial factors in how an accident (and/or an expectation of a level of safety) will be interpreted at any particular moment in time. Accordingly we now turn to consider where the "policy and cultural winds" are currently blowing (but also examine the extent to which the "grass roots" experience may be adrift from the emergent policy and cultural position).

3.1 The growing consensus for public risk tolerance

As mentioned above, the concept of "a compensation culture" has a closely related notion - namely, a belief that society is becoming increasingly risk averse. In this chapter we look at the growth of a policy backlash against this position on risk (which, by implication, is also a backlash against the compensation culture). This mobilisation is also a signal of a desire by a wide consensus of senior public policy figures (in politics, law and culture) to change attitudes towards risk, to see its beneficial side and to move away from an expectation of (or legal entitlement to) absolute (i.e. risk free) safety. However, this chapter closes by noting that lofty pronouncements by senior policy figures do not instantly, or inevitably, result in a change of perception or (less defensive) action at "grass roots" level.

3.1.1 Risk aversion is debilitating

Jill Thrift, Director of CAGE Space in a foreword to the Government's urban design advisory body's 2005 examination of the rise of risk adverse urban design, "What are we scared of? The value of risk in designing public space" views:

"the debate over litigation and compensation is a superficial symptom of a deeper set of cultural issues reflecting our relationship with our surroundings." (Thrift 2005)

As Landry (2005) notes, drawing upon the social theorists who observed and interpreted the rise of "Risk Society" during the 1990s (e.g. Beck 1992; Furedi 1997):

"The evaluation of everything from a perspective of risk is a defining characteristic of contemporary society. Risk is the managerial paradigm and

default mechanism that has embedded itself into how companies, community organisations and the public sector operate. Risk is a prism through which any activity is judged...It narrows our world into a defensive shell." (Landry 2005 p3)

3.1.2 The wind of change

In May 2004 the Better Regulation Task Force delivered its report to the UK Government on "compensation culture" and what to do about it. The Task Force was an independent advisory group established by the UK Government in 1997 with the remit of advising Government on:

"action to ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted." (BRTF 2004, Annex C).

In examining the perceived growth of a compensation culture in the UK - and what to do about it - the Task Force characterised the problem as follows:

"The prospect of litigation for negligence may have positive effects in making organisations manage their risks better, but an exaggerated fear of litigation, regardless of fault can be debilitating. The fear of litigation can make organisations over cautious in their behaviour. Local communities and local authorities unnecessarily cancel events and ban activities which until recently would have been considered routine. Businesses may be in danger of becoming less innovative - and without innovation there will be no progress." (BRTF 2004 p3)

The Task Force's final sentence chimed well with the then Prime Minister's (Tony Blair) own view that for the UK Economy to prosper it was necessary to encourage a greater degree of risk taking - and not to penalise failure:

"A risk adverse business culture is no business community at all." (Blair 2005)

This policy objective had been given legislative expression in the Enterprise Act 2002, which aimed to reduce the stigma of business failure through reducing the time period during which Bankrupt persons are barred from full civic and economic participation.

Whilst this report is concerned with recreational, safety and land ownership matters it is important to appreciate that much of the current policy consensus has this link with the belief that sustainability (both socially and economically) requires that desirable side of risk be embraced more in contemporary Britain.

The claimed link between outdoor endeavour, "character building" and the development of valuable skills is not a new phenomenon, in recent decades it has its basis in "outward bound" and Duke of Edinburgh Award type programmes. The current public risk policy consensus draws much of its claimed authority from by inheriting and restating this view that adventure and risk create more capable people. Various campaign groups claim this message as their essence, for

example the "Campaign for Adventure" lobby group (whose slogan is "Balancing Risk and Enterprise in Society"):

"The Campaign seeks to show that life is best approached in a spirit of exploration, adventure and enterprise; to influence and better inform attitudes towards risk; to build wider recognition that chance, unforeseen circumstances and uncertainty are inescapable features of life and that absolute safety is unachievable; and to demonstrate that sensible education and preparation enable an appropriate balance to be achieved between risk & safety and achievement & opportunity." (Campaign for Adventure 2006)

The campaign was founded in 2000, with the endorsement of a diverse range of supporters, including HRH The Duke of Edinburgh. Tony Blair, John Harvey-Jones, Ken Livingstone and Jonathan Dimbleby are listed amongst the Campaign's 2007 campaign sponsors.

In a similar vein David Willetts, as chairman of the Conservative Party's Childhood Review has declared:

"Children need to play games and take risks. If we do not allow risk in adventure activities which are supervised, children will end up getting involved in much more dangerous activities that aren't supervised at all. Children need to learn to deal with risk if we are to keep them out of real danger...Children should be able to enjoy a world of conkers, yo-yos and snowballs." (Willetts 2007)

The reference to these traditional childhood play activities was an allusion to recent instances of local authorities and other bodies reportedly prohibiting such activities on the grounds of safety and liability risk.

Even the Royal Society for the Protection of Accidents (RoSPA) has (according to BRC 2006) said that it is right for children to get bumps and bruises so that they learn about risk, and that:

"The ability to judge risks as adults is not something that we simply acquire at the age of majority. It is a skill that is learnt through exposure to hazards...providing an appropriate mix between risk and safety is a balancing act, but it is one that we, as adults need to get right so that our children are not denied their right to play as enshrined within Article 31 of the United Nations Convention on the Rights of the Child." (David Yearly, RoSPA Play Safety Manager, quoted in Jones 2007, p15).

RoSPA has been instrumental in setting up LASER (Learning About Safety by Experiencing Risk) - which hosts experiential learning (i.e. learning through doing) sessions for children and adults around the UK - including sessions themed around safety in leisure pursuits.

At a speech in 2005 the then Director General of the Confederation of British Industry, Sir Digby Jones (now a Labour peer), called for young people to be taught more about risk taking than about their rights. Subsequently Sir Digby has

continued to lobby this theme, now in his role as president of school leadership and employability of young people social enterprise HTI (Heads, Teachers and Industry), restating his view in HTI's report "Cotton Wool Kids":

"We need to set aside our often irrational fears and give children controlled opportunities to confront risk and challenges in different settings, so that they can experience winning and failure, learn to be creative and innovative, grow in self-esteem, motivation and confidence in their relationships with others and strengthen their capacity to deal with uncertainty." (Jones 2007, p13)

Jones also talks of the components of our culture's risk adverse mindset:

"blurred and confused boundaries around risk, health and safety, regulation and responsibility that are pushing us ever closer to becoming a nanny state." (Jones 2007, p23)

In October 2007 the Royal Society for the encouragement of Arts, Commerce and Manufacturing (RSA) joined the emerging consensus by publishing a report of its "Risk Commission" entitled "Risk and Childhood". The RSA's Risk Commission following its Chairman's speech in 2005 on the theme "Risk and Enterprise". Once again the linkage between entrepreneurship and inculcating a more positive relationship with risk was drawn.

3.1.3 An argument won

In 2006 the Better Regulation Task Force was given a statutory footing as the Better Regulation Commission - and in that guise published a further report: "Risk, Responsibility and Regulation - whose risk is it anyway?" in October 2006. That report (BRC 2006) proved influential, and moved the policy debate on from examination of "compensation culture" into the (related) area of questions around who should have responsibility for managing risk - and to what degree should risk be managed.

Following endorsement (and adoption) by the Government of most of the BRC's recommendations (BRC 2007) the BRC's Chair, Rick Haythornwaite proudly announced:

"Our report ignited a much needed and long overdue debate amongst very disparate groups all over the country..."Whose risk is it anyway?" struck a cord with a great many people who believe that increasing risk aversion is an undesirable trend which can be halted. Today's positive response from government is a very important step in that process." (UK Government 2007)

The report focussed upon the negative effects of risk averse approaches to regulation - and in particular argued strongly in favour of action being taken to more carefully appraise the pros and cons of any intended regulatory intervention aimed at addressing a safety issue, and to take steps to emphasise the freedom of

choice and personal responsibility aspects of allocating the burden (and confining the extent of) risk regulation.

Indeed other agencies share BRC's view that the public risk message has got through, for example CAGE Space (2007) concluded that its focus group interviews of public space designers, managers and user groups:

"reveal that the climate is moving towards a more proportionate and "sensible" approach to risk assessment and management. Resisting forces have strengthened. Professional bodies and other organisations interested in public space design are also working together to improve understanding." (CAGE Space 2007, p38)

3.1.4 The Government responds

Even the UK Government appears to have joined the emerging public risk consensus in recent years, indeed Tony Blair was an early advocate of the new perspective, having said in November 2000:

"Everything we do in our everyday activity, in our work and leisure, involves some element of risk. Risk is an inescapable part of our lives. The challenge for all of us[...] is to manage risk in a way which gives us the necessary protection we need without constraining what we do beyond a level that is justified." (Blair 2000)

In a speech to the Institute for Public Policy Research in May 2005 Mr Blair called for a *"sensible debate about risk"*, expressing the view that:

"We are in danger of having a wholly disproportionate attitude to the risks we should expect to run as a normal part of life... spending hundreds of millions of pounds to reduce [a] risk to zero may be a foolish way of prioritising expenditure...we cannot respond to every accident by trying to guarantee ever more tiny margins of safety. We cannot eliminate risk, we have to live with it, manage it." (Blair 2005)

This echoes wider UK Government pronouncements that reflect the current policy consensus around the need to tackle the twin evils of the perceived rise of a "compensation culture" and increasingly risk adverse behaviour (in part) in response to it:

"The Government is determined to scotch any suggestion of a developing compensation culture where people believe that they can seek compensation for any misfortune that befalls them, even if no-one else is to blame. This misperception undermines personal responsibility and respect for the law and creates unnecessary burdens through an exaggerated fear of litigation." (UK Government 2004)

"We want to tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour." - Lord Falconer (November 2005) (Falconer 2005)

On the issue of children and encouraging risk-taking in education the Children's Minister, Ed Balls, launched the UK Government's own consultation, "Staying Safe" in July 2007 (HM Government 2007) to seek out a sensible balance between ensuring children's health and encouraging them to take healthy risks: in the form of "*safe learning and exploring*". The Government's own position mirrors that of the main lobbyists, in terms of the need to acknowledge and engage with the positive side of risk, as Balls states, delivering safety for children:

"...does not mean that we should wrap children and young people up in cotton wool. Childhood is a time for learning and exploring. Through playing and doing positive activities, children and young people can learn to understand better the opportunities and challenges in the world around them, and how to stay safe..." (UK Government 2007, Ministerial foreword)

The Government's subsequent action plan acknowledges that of the 1039 respondents to the consultation (of whom 649 were children):

*"The majority of respondents agreed that it is important for us, as a society, to **strike a balance between protecting children and allowing them to explore and learn about risks for themselves**. There was also widespread concern that this balance is currently not being achieved."* (UK Government 2008 - emphasis in the original).

Initiatives arising from the action plan include:

- spending £225 million on outdoor play initiatives;
- an additional £100 Million to be invested in physical activity opportunities for children and young people; and
- launching new guidance on taking pupils outside the classroom as part of the 'Out and About' package, which will also include revised *Health and Safety of Pupils on Education Visits* guidance.

Although it must be noted that there are signs of tension within the minister's attempts to find a balance point between the educational value of risk and the institutional desire to prescribe safety. According to Utley (2007) Mr Balls at the launch of "Staying Safe" said that children should be allowed:

"...to have snowball fights in winter and to play conkers in the autumn. [But] he wasn't quite so clear about tree climbing. In one breath, he said: "It would probably not be a good idea to let children climb trees." In the next, he announced: "If children can't climb trees, it is very hard for them to learn about risk."

In support of the latter proposition, The Play Safety Forum has a position statement, which whilst it doesn't specifically address tree climbing, states that risk-taking is an essential part of play provision and that addressing safety in design must necessarily involve compromises:

"Children's competencies in almost every area of their lives develop because they take risks. Children learn how to judge the world around them through risk taking. Especially in their play. Unfortunately though, fears of litigation by parents combine with low maintenance budgets for playgrounds and equipment to restrict children's opportunities for challenging play. Playgrounds are frequently closed or have challenging equipment removed" (PSF 2004)

3.2 Steps taken to implement the new view on public risk

3.2.1 The Compensation Act 2006

In reflection of the building consensus around the positive aspects of managed and responsible exposure to risk - and the potential counter-productive effects that would arise were UK civil law to take a risk averse turn - the UK Government enacted (for England & Wales only) the following provision in its Compensation Act (an Act which was largely concerned with introducing a regulatory regime to tackle CMCs and fears of a compensation culture):

Section 1 reads:

"Section 1: Deterrent effect of potential liability

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or*
- (b) discourage persons from undertaking functions in connection with a desirable activity."*

Which in the Government's view is intended to mean that:

"as long as individuals and organisations adopt reasonable standards and procedures for their activities, they will not be found liable." (Falconer 2005)

Whilst this provision sends a policy signal to the judiciary, expressly requiring them to consider the wider social implications (i.e. for recreation and public health) when deciding how to interpret the current boundaries of negligence and reasonable safety provision, the Section as it stands remains rather abstract (and token and rather detached from the education / risk and adventure origins of this policy intervention). During the Parliamentary scrutiny (Hansard 2006) of this legislation there had been calls to address concerns in more specific detail, and many of these further points (rejected by the current Government) appear remain alive within Opposition circles. The Conservative Party's Childhood Review (Willets 2007) proposed revision to the Act to further counter the perceived slide towards a risk-adverse compensation culture, key changes would include:

- liability only to arise for organisers of adventurous activities where "reckless disregard" for the participants' safety can be proved;
- courts to be required to take into account the social value (and benefits) of sports and adventure when making decisions;
- risk management training to be introduced for teachers to encourage them to confidently engage in adventurous trips and activities;
- removing any actual or implied duty upon activity organisers to warn of "obvious risks"; and
- establishing a presumption of contributory negligence if any individual participating in sport or an adventure activity ignores risk warnings or is intoxicated

clearly such pronouncements may become more qualified if ever implemented by a future Conservative Government - and as currently formulated there is plenty of scope for uncertainty around the broad concepts of proving "reckless disregard", calculating the social value of adventure risk or defining "obvious risks". However it appears to give a clear signal that a change of Government would see an (even) greater focus on attempts to tackle the perceived detrimental effects of compensation culture - and that this, in part, would be expressed via future legislative engineering.

3.2.2 Cabinet Office's Risk and Regulation Advisory Council

In January 2008 Prime Minister Gordon Brown announced the creation of a cross-Government Risk and Regulation Advisory Council (RRAC) and declared that:

"The issue of public risk is one of the most challenging areas of policymaking for any government. I have asked the Risk and Regulation Advisory Council to provide a catalyst for the change we need in the way policy is developed across all departments." (BERR 2008)

BRC is now subsumed into the RRAC - and the change of name (and widening of role) shows how deeply the issue of risk and compensation culture concerns are embedded within framework thinking about regulation and approaches to law and policy in general is now embedded in the (more long running) Government's anti "red tape" agenda (and its traditionally more narrow, competitiveness and enterprise focus).

The RRAC is tasked with adjudicating major, complex, issues of risk policy - whether this wider role will see focus move away from the themes of tackling the compensation culture, risk adverse land management and/or the education benefits of risk remains to be seen - however it is notable perhaps that it will not produce another galvanising report to follow on from BRTF 2004, BRC 2005 or BRC 2007 on such matters in the foreseeable future. Its current work priorities appear to be animal disease, food safety, obesity and pensions (BERR 2008).

Finding the balance point between visitor safety in recreation and the benefits of risk and adventure in recreation *is* an issue of public risk, but perhaps one that will not have the same profile or sense of urgency going forward as pressing debates on nuclear risk, food safety and climate change.

3.2.3 "Get a life"

Even the UK's health and safety policy regulator (the Health & Safety Commission and its executive arm, the Health & Safety Executive) has joined the consensus calling for resistance to the slide towards a risk adverse society.

In August 2006 the Health & Safety Commission's Chair, Bill Callaghan announced:

"I'm sick and tired about petty health & safety stopping people doing worthwhile and enjoyable things...My clear message is that if you are using health and safety to stop everyday activities - get a life and let others get on with theirs...Sensible risk management is emphatically about saving lives, not stopping them." (HSE 2006)

In support, the Health & Safety Executive's Deputy Chief Executive, Jonathan Rees, declared:

"...health and safety is not about long forms, back covering, or stifling initiative. It's about recognising real risks, tackling them in a balanced way and watching out for each other. It's about keeping people safe - not stopping their lives." (HSE 2006)

These statements heralded the start of an HSC / HSE campaign to tackle head-on the health and safety "myths" which, in their view, were distorting public understanding of what this body of law actually requires. Their concern was that such stories of over-regulation and risk-aversion undermine the credibility of the HSE as regulator and devalue the important aims of what health and safety law is actually seeking to achieve.

In support of this mission the HSE set up a website (www.hse.gov.uk/myth/index.htm) on which a "myth of the month" could be reported, ridiculed by cartoon and thereby rebutted - all in tabloid style. Calendars featuring the most entertaining (and eccentric) myths have been published by the HSE. In more sober style the HSE also has committed to an attentive media campaign, writing to editors of national newspapers with the aim of challenging the wildest misrepresentations of health and safety legislation.

The HSE's campaign aims to tackle the power of misperception - setting out to challenge the mis-messages using the same language and style that they circulate in. The April 2007 "myth of the month" relates to a perception that hanging baskets are now outlawed. Alongside a humorous cartoon image (which can be printed out as a poster should you wish) the HSE website addresses this myth thus:

"Back in 2004 a town did briefly take down its hanging baskets over fears that old lamp posts would collapse. This was an overly-cautious reaction to a low risk. However, after quick checks the hanging baskets were replaced and have been on lamp posts in the town every year since. Despite this, the story continues to be repeated and the danger is someone will believe it is a genuine requirement and follow suit." (HSE 2007)

The HSE's campaign is valiant and innovative - but eradication of myths is never easy. In our scoping study few of the health and safety managers that we spoke to appeared aware of the HSE's "myths" website. If professional managers are not aware of this initiative then the likelihood that the section of the general public that believes these myths will be aware of it and its debunking message would appear low.

3.3 How the courts are engaging with this new view on public risk

The emergence of a consensus amongst the "great and the good" around the need to counter "compensation culture" and "risk averse" society is of no consequence (in terms of landowner liability) if that consensus fails to have any "grass roots" (culture change) impact. Landowner liability is underpinned by a fear that a land owner will find himself liable in the event that a visitor is harmed upon his land. In short, unless the law actually changes (or is clarified in supportive way) and/or people come to perceive more accurately how significant the liability risk actually is, then claims will still be brought and (overly) cautious behaviour by land managers will still ensue.

It is therefore vital to explore:

- 1) How the senior courts and judges are reflecting this policy consensus; and
- 2) What difference (if any) this is actually making to the apprehension and/or implementation of negligence law at "grass roots" (day to day) level.

We now look at each issue in turn.

3.3.1 Landowner liability for natural hazards

The related doctrines of negligence and nuisance each offer the potential for landowner liability for conditions arising naturally upon their land. In the 1960s it had appeared that the scope of such liability was ever widening, and a view had emerged that land ownership brings both rights and responsibilities and that therefore landowners might often be held liable for failing to address a naturally arising hazard on their land (see for example Goldman -v- Hargrave (1967) 1 AC 645; Privy Council).

However this position has been increasingly diluted in recent years. Instead, it now appears, landowner liability for natural hazards (and to undertake remedial action to prevent them causing damage to neighbouring property) is qualified by notions

of reasonableness and foreseeability (of type and extent of likely damage). In Holbeck Hall Hotel Ltd v Scarborough Borough Council (2000) QB 836 the Court of Appeal held that a cliff owner had only a "qualified duty of care" in relation to coastal erosion. The court held that landowner's duty would not in all cases require works to be undertaken to prevent the natural hazard from occurring. The Court indicated that, given the rival calls on landowners' resources, in some circumstances a warning to the neighbouring property might be sufficient to discharge the duty of care.

3.3.2 Tomlinson -v- Congleton Borough Council (2003) UKHL 47

Prior to the keystone House of Lords judgement in Tomlinson a line of cases had emerged that appeared to impose liability upon landowners for persons harmed whilst carrying out dangerous and unauthorised activities there, in particular swimming and diving. Tomlinson concerned a claim for compensation by a man seriously injured whilst undertaking a "running jump" into a shallow lake at a country park. Whilst the High Court judge had dismissed the claim, on appeal the Court of Appeal had found in favour of the claimant - expressing the view that the landowner should have *ensured* that persons could not undertake risky activities at the park. However, on further appeal to the House of Lords, their Lordships delivered very forceful judicial expressions of the public risk consensus and rejected Mr Tomlinson's claim completely.

The House of Lord's judgement is a robust defence of risk and liberty, with the following intentional sound bites expressed for the benefit of the lower courts (and society in general):

"An important issue of freedom [was] at stake." - Lord Hoffman

"it is not, and should never be, the policy of 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." - Lord Hobhouse

"simply sporting about in the water with his friends, giving free rein to his exuberance. And why not? And why should the council be discouraged by the law of tort from providing facilities for young men and young women to enjoy themselves in this way? Of course there is some risk of accidents arising out of the joie-de-vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone." - Lord Scott

3.3.3 Post Tomlinson cases

The House of Lords judgement was intended as a clear signal - and there is evidence that it has (as intended) steered subsequent cases across the UK. For example:

Keown v Coventry Healthcare NHS Trust (2006) EWCA Civ 39 - Court of Appeal

An 11 year old boy trespasser fell whilst climbing the underside of a fire-escape. Noting that the law requires occupiers to have a special regard for the safety of children the Court of Appeal concluded that the claimant had realised that what he was doing was risky and had therefore consented to the risk of his own injury - and that therefore the occupier was not liable for failing to prevent this accident

Siddorn -v- Patel (2007) EWHC 1248 - Court of Appeal

A landowner was not liable when a tenant decided to dance whilst drunk on a Perspex garage roof and subsequently suffered injury when that roof collapsed. There was no duty to warn of the obvious dangers inherent in trespassing in this way.

Poppleton -v- Trustees of the Portsmouth Youth Activities Committee (2008) EWCA 646 - Court of Appeal

An indoor climbing centre was not liable for the injuries sustained by a climber who fell. Drawing authority from the Tomlinson judgement Lord Justice May declared:

"Adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no recompense if the risk materialises so that they are injured."

R. (on the application of Hampstead Heath Winter Swimming Club) -v- Corporation of London (2005) 1 WLR 2930 - High Court

In a notable example of crossover between civil and criminal law, the High Court in this case chose to draw upon the forceful pronouncements of the House of Lords in Tomlinson (a civil case) to justify a public risk perspective regarding a criminal matter. The case concerned an anxiety by the owners of Hampstead Heath that they would face criminal liability (i.e. under the Health & Safety at Work Act 1974) if they allowed the Swimming Club to continue to practise lake swimming. The club applied for a High Court interpretation of the position, in the face of fear that the park owners would close the lake. Justice Stanley Burnton, in giving judgement declared that the Corporation of London would not be liable for a breach of the 1974 in allowing unsupervised swimming in the lake on the basis that:

"The swimmers will be under no compulsion or pressure to incur the risks involved in self-regulated swimming. They will do so of their own free will. The criminal law respects the individual freedom upheld by the House of Lords in the Tomlinson case." (p2949)

Incidentally, there is little evidence of the HSE taking much enforcement action (prosecution of otherwise) in relation to recreational land. Research conducted by the Environmental Law Foundation (ELF 2005) surveyed the HSE's database of the 3,526 prosecutions brought during the period 1999 to March 2005. It found

only five cases related specifically to outdoor activities and open spaces, a very small fraction of the total, which comprised:

- a prosecution for failure to comply with an Improvement Notice requiring risk assessment of a playground in Bristol;
- a diseased tree falling on cars;
- a member of the public injured following the collapse of a solid panel hoarding; and
- an employee injured whilst pollarding a tree.

The above cases show a clear and consistent current opinion from the UK's senior judiciary that favours personal responsibility. However, these cases are all concerned with persons harmed (directly or partly) as a consequence of their own risky activities. In the following section we will consider the more equivocal picture that emerges where injuries occur to walkers or passers by and in doing so seek some insight into the extent to which policy and judicial pronouncements in the vein of the public risk consensus is building a robust, stable and restricted rule structure for landowner liability.

3.4 But is the new view on public risk impacting at ground level?

For there to be grand pronouncements by the great and good in political and judicial circles is one thing - but it is that consensus impacting how the lower courts, claimants, insurers and land managers actually behave?

3.4.1 In the courts

We have examined above the inherent uncertainty that law and liability processes present. Accordingly it is to be expected that tweaks of legislation, declarations of policy and priority and judicial pronouncements will not immediately and directly reshape grass roots behaviour.

There are two trends to consider here:

1. Consistency of courts in dealing with countryside and recreational access accidents; and
2. Instances where "remedy - led" judgements in areas other than countryside and recreational access can reinforce a general impression amongst land managers that "the law is out to get them".

We will take these issues in turn.

Are the courts consistent in how they deal with countryside and recreational access accident cases?

There are few reported cases - but largely the cases have been unsuccessful and the courts (even before Tomlinson) have been sympathetic towards the impossibility of eliminating risk entirely in the countryside. Some illustrative examples (many at "junior court" level - which in the post 2003 cases shows good downward filtration of the Tomlinson message) include:

- **Stevenson -v- Corporation of Glasgow (1908) SC 1034 - Court of Session**

The claimant's infant son had fallen into a river adjacent to parkland and drowned. The court rejected the claim for compensation. Lord Kinnear declared:

"a person going upon property, even by invitation, express or implied, is expected to use reasonable care for his own safety...[there is] no duty upon the owners of public parks to fence very stream of water or every pond which may happen to be found in a public garden."

(this 1908 judgment was relied upon by the Court of Session in the case of Graham -v- East of Scotland Water Authority (2002) SCLR 340 to declare that no liability arose for failure to have fenced a reservoir).

- **Staples -v- West Dorset District Council (1995) PIQR P439 - Court of Appeal**

Claimant slipped on algae on The Cobb, Lyme Regis. The owner of this walkway was held not liable. The risk was a self evident one. There was no duty to warn of it.

- **McGeown -v- Northern Ireland Housing Executive (1995) 1 A.C. 233 - House of Lords (Northern Ireland)**

Claimant tripped using a right of way path and claimed compensation. The House of Lords rejected the claim, holding that a person using a right of way is not a visitor if the landowner (but instead has the status of "trespasser") for the purposes of applying the Occupiers' Liability Acts. Accordingly the owners owed no duty to maintain the path.

- **Strachan -v- Highland Council (1999) GWD 38-1863 - Sheriff Principal**

Claimant was walking near the edge of a cliff, passed beyond a fence and consequently fell over the edge of a cliff. The Council was held not liable. Regardless of the condition of the fence it was an obvious barrier. In choosing to go beyond that point the claimant had decided to expose himself to an evident risk of injury.

- **Vincent -v- Restormel Borough Council (2000) CLY 4496 - County Court**

Claimant tripped on steps forming part of a coastal path and claimed compensation on the basis of an allegation of failure to adequately maintain the path and/or to warn of the danger of the steps. The Council was held not liable. The risk was self evident, and the further signage and/or maintenance would have been in excess of what the Council should reasonably be expected to do.

- **Darby -v- National Trust (2001) EWCA Civ 189 - Court of Appeal**

Claimant drowned whilst swimming in a pond. The National Trust was not held to have been negligent for an absence of "no swimming" signs. Lord Justice May commented:

"It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coastline would be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs."

- **Martin -v- Peterborough County Council (2003) EWHC 2925 - High Court**

Claimant tripped over a pothole whilst walking along a path in a park and claimed compensation. The Council was not held liable. The judge, drawing on Tomlinson concluded that that claimant, in walking along the path, should *"have looked out for herself and it appears that she failed to do so"*.

- **Julio Ferrari -v- National Trust (2004) NIQB 56 - High Court**

Claimant fell whilst visiting the Giant's Causeway, alleging that one of the basalt columns that comprise the Causeway had given way as he was standing up from a sitting position. The judge drew heavily from the Tomlinson judgment in reaching his decision. He found the National Trust not liable - expressing the view that whilst the claimant was not engaged in any particularly dangerous or unusual activity at this location, no liability attached to the National Trust for it because it appeared, on the available evidence, the collapse of a basalt column had not been foreseeable, and in all other relevant respects the National Trust were adequately discharging their duty of care to visitors to this natural site.

- **Mills-Davies -v- RSPB (2005) CLY 4196 - High Court**

Claimant tripped on tree stump at a nature reserve, fell onto another tree stump and was blinded in one eye. The RSPB was held not liable. The presence of such features was an obvious hazard inherent in the nature of the countryside. To impose liability would have undesirable

consequences as such features could not realistically be removed and the only other consequence would be closure of access, which would be detrimental to a public good.

- **Struthers-Wright -v- Nevis Range Development Co PLC (2006) CSOH 68 4 - Court of Session**

Claimant was an experienced skier who fell whilst mountain skiing. He claimed that the company managing the ski area had been negligence in failing to erect danger signs. Drawing from Tomlinson, the judge rejected the claim on the basis that the dangers were self evident and that signage would have been ineffective and conflicted with the aesthetic beauty of the mountainside.

- **Fegan -v- Highland Council (2007) CSIH 44 - Court of Session**

Claimant fell over a cliff and claimed that the Council was liable in negligence because it had not erected a fence. Lord Johnston drew upon long standing authorities in declaring that:

"an occupier of land containing natural phenomena such as rivers or cliffs, which present obvious dangers, is not required to take precautions against persons becoming injured by reason of those dangers, unless there are special risks such as unusual or unseen sources of danger."

- **Trueman -v- Aberdeenshire Council (2007) A2138/02 - Aberdeen Sheriff Court**

Claimant stumbled over a broken fence in a local park. She claimed compensation on the grounds that the Council had failed to maintain the fence. The Council was found 20% liable - but the claimant was held 80% to blame for her own injuries on the basis that she had been drinking, and had a responsibility to look where she was going.

It appears clear from the above cases that there is a settled view in the courts across the UK that absolute safety is not required to be provided by landowners who give (or are required to give) access to their countryside land. There appears also an implicit acknowledgement that these expectations of safety provision will differ for the countryside from what may be applicable in an urban setting (although this is only a question of degree - Tomlinson is still a powerful precedent in relation to the law's pragmatic expectations of safety provision regarding recreational access to open land, where ever it is). Whilst there is no direct judicial ruling on this point, the views of the Law Reform Advisory Committee for Northern Ireland in a discussion paper published in 1993 (EHSNI 2006, p45) reflected this distinction in its comment that:

"It should be obvious to users of rural rights of way that the paths have not been made up and that they therefore cannot reasonably expect that

degree of maintenance that would be appropriate for properly constructed urban road or footpath dedicated to public use."

Whilst the spirit of Tomlinson can be heard in many of the cases summarised above, it should also be noted that section 1 of the Compensation Act 2006 (which requires judges to consider the danger that imposing liability on socially desirable activities may deter people in future from undertaking those activities) seems to have registered little in the minds of the judges as the declared basis for their findings - Tomlinson has been a powerful signal to the courts throughout the UK but section 1 of the 2006 Act appears to have had little additional influence. There is no evidence that the existence of section 1 in England & Wales (and the absence of any express equivalent "public risk" exhortation in Scotland or Northern Ireland) has caused any divergence between the law as applied by the judges in each jurisdiction. By one view section 1 is unnecessary because Tomlinson has had such a wide reception - and its anti risk adverse culture and anti compensation culture sentiments have been applied in a variety of factual scenarios quite remote from the actual subject matter at stake in the Tomlinson case itself (i.e. the inherent dangers of adult diving / lake swimming activity).

How do "remedy-led" cases in other areas affect countryside landowner's liability perceptions

In Simonds -v- Isle of Wight Council (2004) ELR59 - High Court) a High Court Judge held on appeal, drawing upon Tomlinson that a County Court judge had been wrong to decide that a Council had been negligent because it had failed to immobilise or fence off swings during a school sports day and to warn parents of the dangers of unsupervised play on the swings. Mr Justice Gross, the High Court Judge said:

"...playing fields cannot be made hazardless...the common sense of this matter is this was an accident, or at all events an incident, for which no liability attached to the school and hence to the council."

In his closing remarks the Judge made clear that he fears the social consequences should liability have been imposed:

"The upshot would be that swings are fenced off, it is far more likely that sports days and other simple pleasurable sporting events would not be held if word got around that a school could be liable in a case like this."

However not every case is decided from such a wide awareness of the public risk implications - both in terms of the cost and inconvenience of remedial and control measures that would be required, or how landowners and the public will perceive the law and its balancing of safety and recreation.

Despite the forthright judicial statements in Tomlinson (and Section 1 of the Compensation Act) there are still cases being reported that maintain the impression that liability is easy to attract - and that withdrawal of facilities may be the safest option.

These examples may not come from countryside access scenarios but via prominent media reporting they can continue to shape the landowner's perception of the liability he may be facing.

Contrast, for example, the Simonds case with the High Court's decision in the recent case of **Samuel Harris (A minor) -v- Timothy & Catherine Perry (2008) EWHC 990 - High Court**. The High Court's decision in Harris was widely reported in the national media. It involved the Perry's arranging a "bouncy castle" party for their triplets' 10th birthday. The bouncy castle was hired and erected in a playing field behind their house. During the party the claimant (who was 11 at the time) passed by with others and they asked to join the party playing on the bouncy castle.

The High Court found that the Perry's had allowed this. In the course of some boisterous play on the inflatable by Harris and others, Harris was struck by a child's heel and sustained serious injury. Harris claimed compensation on the grounds that the Perrys had failed to adequately supervise the use of the inflatable. Harris' claim was successful, with compensation likely to exceed £1 Million.

However the High Court's decision did not stand for long - in July 2008 the defendants successfully appealed to the Court of Appeal in **Timothy Perry, Catherine Perry v Samuel David Harris (a minor and a patient, suing by his Mother and Litigation friend, Janet Harris)** (2008) EWCA Civ 907 and that Court declared:

"The accident was a freak and tragic accident. It occurred without fault."

In reversing the High Court's finding the Court of Appeal looked in detail at the specific circumstances of the incident but also implicitly drew upon Tomlinson and Sutton based public policy arguments, for example:

"Children play by themselves or with other children in a wide variety of circumstances. There is a dearth of case precedent that deals with the duty of care owed by parents to their own or other children when playing together. It is impossible to preclude all risk that, when playing together, children may injure themselves or each other. It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so."

Accordingly in this case, through a mixture of micro-level examination of the actual circumstances of the incident in question (and the level of reasonable precaution actually taken and level of harm that was foreseeable) and recourse to arguments of "public interest", an approach consistent with the "public risk" consensus was re-established by the Court of Appeal. Yet there must be many who will have heard the press reports of the original High Court decision who will remain unaware that that decision has actually been subsequently overturned by a higher court. The Court of Appeal's "correction" of this case received much less press attention than the "scary" story embodied in the High Court's original decision.

In press reports about the High Court's original decision in the Harris case two commentators had remarked how the essential issue was access to compensation (and liability insurance cover provided by the Perry's house insurance) with Peter Cornall, Head of Leisure Safety at RoSPA commenting that if the accident had happened (through lack of supervision) in a road traffic context then it would have been unremarkable (Johnson 2008) whilst Peter Forshaw, Head of Leisure Law at Weighmans solicitors noted that:

"Had this involved a commercial operation, I don't think anyone would have been up in arms. Because it involves a birthday party there has been a lot of comment." (Meeson 2008)

In short, the original decision was not shocking to those who operate within the insurance and accident litigation field, because such an approach would be unremarkable in many (more mainstream) types of accident case. These comments remind us of the instrumental nature of modern accident litigation - and the fact that in road traffic and occupational accident spheres lack of supervision of an activity or place will routinely lead to liability.

This point is illustrated well by another case that has received a high level of (disapproving - see Ultley 2008) press comment: **Piccolo v Larkstock Ltd (trading as Chiltern Flowers) (2007) All ER (D) 251 (Jul) - High Court.** Mr Piccolo successfully claimed compensation after slipping on a single flower petal adjacent to a florists shop at Marylebone station. The claim was successful - on the basis that the presence of the petal proved that the shop did not have an adequate system in operation to ensure that no one could come to harm as a consequence of its operations. Permission to appeal against this ruling was refused by the Court of Appeal.

To a lay audience the fact that cases based upon the same legislation and prior case law can appear to apply such widely differing standards of care must be a source of confusion. That confusion must then be "solved" by each individual finding some way to rationalise why some cases went to one extreme (e.g. personal responsibility), whilst others went to the other extreme (i.e. imposing liability on the basis that the landowner failed to provide a very high level of supervision and safety). One reaction to this dilemma would be to assume that one set of cases is more correct than others - and people may naturally assume that the most recent case in time represents the law's latest thinking. Accordingly press reports of a sensational case may appear to render obsolete prior, more reassuring (and more pertinent), cases which that observer was aware of.

Such rationalisations also have to be made by lawyers - but they will be less steered by the date of a case, realising that factors such as the level of seniority of the court involved; the reputation of the judge; whether the judgement as been appealed and the possibility that it is an "eccentric" judgement that will be assumed to relate only to very unique factual circumstances when considered by future courts - will all go to balance the immediate perception that the liability climate has, via one case, taken a turn for the worse.

Alternatively, the difference of interpretation (of the same law) in the cases summarised above may suggest a fundamental difference between the courts' expectations for workplaces (where the courts expect physical environments to be systematically controlled and kept risk free) and the countryside (where risk to visitors may be more tolerable by the law). But the countryside is, of course, also a workplace - so any attempt at generalising rigid distinction (or rationalisation of the divergence between case law) along these lines is bound to have difficulties if applied to all scenarios.

However Ball (2002) reminds us of the importance of appreciating the innate differences between the management of safety within workplaces, and a different (public risk based) approach which is required when applying the same law to recreational environments:

"in playgrounds risks are held to serve some purpose; in conventional factories they are not...the legal concept of "(reasonably) foreseeable risk" should not be interpreted in playgrounds in the same way as factories...no one in their right mind would incorporate a fireman's pole into a normal workplace as a routine means of descent, nor a wobbly chain-linked bridge as a means of crossing from one elevated level to another." (Ball 2002, Chapter 5)

One private landowner representative respondent in our survey mentioned a member's recent experience which appears to suggest that both an innate pragmatism, and also an innate urban / occupational health and safety mentality may be brought to bear by junior insurance claims processors when determining whether or not to defend a claim.

In the example given, a coastal tourism business included ownership of an area of beach. A visitor cut her foot on an item lying on the beach. She claimed £2,000 compensation. The owner referred her claim to her insurer and the insurer asked whether she had conducted a risk assessment for this hazard and evidence of regular inspections of the beach. In response to her answer that she had not (but had risk assessments for other, core aspects of her business) the insurance representative directed her to pay the claim, rather than to fight it.

It appears that this directive was partly motivated by a "cheaper to pay out than fight" consideration, but also an analytical process on the part of the insurer that involved applying a generic claim appraisal analysis that whilst it would have accurately reflected the likelihood of liability if the accident had occurred in a shop or other urban or readily manageable setting. The insurer's appraisal of the claim failed to appreciate the physical difference of the countryside (and the practical limits on achieving "total" control over that space) or the more tolerant attitudes of the courts towards matters of landowner liability in a countryside setting. This respondent illustrated the physical difference in the degree to which space could be expected to be controlled in countryside and urban/factory settings by contrasting a farm of 200 acres covered by 1 farmer (for whom visitor management is not a core area of his work) and a 2000m³ factory which might be expected to have the eyes and ears of its sizeable workforce plus a dedicated and

trained health and safety team, delivering day to day surveillance and control of that much smaller area.

3.4.2 Liability for livestock: a countryside access theme with different rules?

A number of the respondents to our survey pointed to the particular concern presently felt by rural landowners about their risk of liability for accident caused by their livestock. There is evidence of a perception that the risk of landowner liability is higher for this issue - and that the courts approach is less accommodating to the public risk argument which renders the actual risk of liability for injury sustained otherwise during recreational access to be low.

This concern can be traced to a House of Lords decision in 2003: Mirvahedy -v- Henley (2003) 2 A.C. 491. The case concerned an incident in which a horse had (though circumstances unknown) escaped from a field and strayed into a road, causing a collision with a passing car and injury to the claimant. The House of Lords considered the intention behind the Animals Act 1971 and concluded that Parliament had intended that that Act would impose liability upon a livestock owner for the consequences of his animal's escape even if that owner had no prior reason to believe that his animal would be able to escape from its field or that it would panic and stray into a road if it did somehow escape. One of judges, Lord Nicholls specifically noted that their public risk implications at stake - but decided that these were matters for Parliament, rather than the courts, to address. This is a line of argument that the senior courts sometimes take, when (unlike in Tomlinson) they do not feel minded to commit themselves to making a public risk decision.

One respondent observed that in consequence of this judgment the costs of public liability insurance for horse owners has been markedly increased by insurers (to reflect the increased risk of liability for horse escape related road traffic accidents now that the principle of "no fault" liability has been upheld).

A similar anxiety inducing process has played out to inflame liability fears in relation to injury caused to visitors by cattle. In April 2008 a woman was found dead in a Suffolk field occupied by cattle. The incident was covered in many local and national newspapers. Many, like the Daily Express (Buchanan 2008) were quick to suggest, via their headline: "*stampeding cattle kill dog walker*", yet there were no witnesses to the incident and no formal investigation had yet been concluded to establish the cause of her death. In response to the accident the farmer apparently closed the farm to access (Guardian 2008), but it is unclear whether this was in response to anxiety about exposing others to risk, or as a mark of respect to the deceased. The reports describe an ongoing HSE investigation and feature commentary from RoSPA, the NFU and Suffolk Police.

Any livestock farmer reading the reports would be likely to feel chilled by the incident and its aftermath - investigators, reporters, spectators and the like descending upon the farm, and the uncertainty that will now lie over the farmers' business for a number of years whilst these processes play themselves out and eventually determine whether or not he has any liability for the death. Read

alongside the judgments in Piccolo, or Mirvahedy he might have good reason to feel apprehensive about how matters will eventually turn out.

Details of a current compensation claim involving a walker claiming £1million in compensation for injuries suffered when she was allegedly attacked by cows is also circulating widely within the access and farming communities (Tibbetts 2008), adding to the anxiety.

Such stories are picked up by the general and specialist media. The role of the specialist media (e.g. the farming press) may be particularly important. The farming press will only report cases that are of concern to farmers. In that sense only "bad news" will ever be reported, reinforcing an impression that the liability risk is increasing.

However, stories that might be of greater reassurance to farmers may fail to reach as high a profile. For example, in a 2006 incident in West Wales involving an incident very similar to that reported in Suffolk in 2008 resulted in a coroner declaring at the inquest in to the walker's death:

"It is clear that no blame can be attached to anyone over [the walker's] death, not the cattle, nor their owners." (Tenby Today 2006)

Despite apparent evidence of crushing injuries to the victim's chest the coroner held that the cause of the victim's death was "means unknown".

It is notable that this case appeared to attract comparatively little media attention - and that only the local paper (Tenby Today) reported the Coroner's comment that no blame could be attached to the cows or the farmer.

3.5 Where do people get their ideas from?

People, whether as claimants, land managers, policy makers or judges all build their own impression of what their rights and responsibilities are at law. Few lay individuals ever receive any formal instruction in these matters. It is not surprising therefore that studies consistently show that many people have little understanding of how the law operates and/or how it balances competing interests like safety and recreational access.

This therefore begs the question - where do people get their ideas about law and liability from? - and how accurate are those ideas?

We examine commentators and researchers attempts to interpret what the public, policy makers and land managers believe the relationship between safety, access and liability to be in the next Chapter.

Before doing this we need to consider the extent to which the media can be singled out as the sole shaping force, and thereby blamed for teaching people an inaccurate, distorted view of the actual level of landowner liability risk.

Commentators are quick to put all the blame at the door of the media, and its campaigns against our litigious and risk adverse society (for example BRC 2006 and HSE 2008).

Criticism of pro-claimant judgements like those in Piccolo and (in the High Court's original judgment at least) Harris by media pundits can be vitriolic, and paint a very colourful impression of the perceived slide towards a compensation culture. For example, Utley (2007) writes (in the Daily Mail) of Mr Piccolo:

"Mr Piccolo is a very large man, who judging by his appearance eats too much for his own good...no wonder he did himself so much damage when he took a tumble outside Bella Patel's flower shop...If the same thing had happened to you or me - or to anyone else who knows how to resist that fifth helping of treacle pudding - we would probably have suffered nothing more serious than a couple of bruises to our bottoms and our dignity...doesn't he think he might have survived his fall in slightly better shape if he had taken more care of his figure over the years?" (Utley 2007)

Utley seems in particular to be fired up by the fact that Mr Piccolo was a City banker, and that the size of his compensation claim (£1.5million) was set to drive the owner's "ravishingly beautiful" flower shop out of business (her reported public liability insurance cover level of £800,000 being insufficient to meet in full the claim against her).

However, few risk communication researchers share a simplistic "cause and effect" relationship between sensational media reporting and the formation of fear of a litigious and risk adverse society in the minds of the reader or viewer. Recipients of media messages are rarely undefended empty vessels awaiting the import of opinions and perceptions.

O'Brien & Tabbush (2004) point to work on risk amplification commissioned by the HSE (Petts et al 2000) which found that:

"media can only amplify perceptions of risk if they capture an existing public mood." (O'Brien & Tabbush 2004, p11)

Petts et al found no evidence of a clear cause and effect relationship between media stories and public perception of risk issues. Whilst media influence was a factor that could influence how individuals receive, filter and compare information about risks, it was not the only influencing factor. Indeed, Petts et al note that often:

"people preferred to draw on local resources - particularly direct personal experiences - to make their accounts of risk plausible to themselves and to others." (O'Brien & Tabbush 2004, p11)

This echoes mass communication research carried out by Lazarsfeld and Katz (2005) in the 1950s. Their studies of the transmission of cultural information within a typical mid-western US town found that such information is channelled to the majority of any community via local respected peers. Through this so-called "Two-

step flow of communication" the message is mediated (i.e. diffused) within a community, with local meaning and interpretation (and an inevitable element of selectivity and "Chinese whispers" distortion) added along the way. In short, communities choose what they want to hear and construct their own meaning around it.

Furthermore the research of Wildavsky and Dake (1990) suggests that risk perception is socially determined - that, in effect, people choose what risks to worry about. In a study of attitudes toward the perception of technological risk Wildavsky and Dake found that:

"cultural biases provide predictions of risk perceptions and risk-taking preferences that are more powerful than measures of knowledge and personality and at least as predictive as political orientation." (p50)

Wildavsky & Dake point out that:

"the great struggles over the perceived dangers of technology in our time are essentially about trust and distrust of societal institutions, that is about cultural conflict." (p56)

and, for this reason, attempting to convince anxious communities that they have a misperception of the level of risk posed by any issue by pointing solely to "the facts" may not always achieve a significant change in that community's perception of the risk in question, because:

"It is not only that "the facts" cannot by themselves convince doubters, but that behind one set of facts are always others relating to whether business and government can be trusted." (p55)

We explore the issue of audience analysis further in the next section, and also return to this theme when considering the findings of our scoping study in Chapter 6 - specifically in relation to the different perceptions of landowner liability risk that appear to exist between some farming communities and Government agencies charged with pro-access responsibilities.

3.6 Rebuttal and perception adjustment

It is not surprising that public agencies have in recent years sought to address "head-on" the apparent misperception amongst some landowners that their risk of liability is greater than those agencies' sober assessment of these matters (via legal analysis) finds the level of risk to actually be low.

It was reported above that the HSE has a specific campaign aimed at exposing (and neutralising) media reports that are likely to sustain an inflated perception of landowner liability risks and the HSE is not the only voice seeking to redress the balance and embed a more realistic perception, illustrations of "positive message sending" include the following:

- Gordon Brysland (1995, p11), quoted by Barlow (1995) at climbing conference Escalade 95:

"There are no reported cases where either a land manager or an occupier has been held liable by a court for a climbing accident in Australia, the United States, Britain or New Zealand. Once this is appreciated, liability concerns cease to be a valid reason for denial of climbing access."

- Department of the Environment (Northern Ireland) in its information leaflet on landowner liability (DOENI 2007, p2):

"There is in fact no known evidence that successful claims are being made in Northern Ireland against private landowners as a result of using permissive paths or otherwise allowing their land to be used for informal open-air recreation."

- Scottish Natural Heritage in introductory website preamble to its guidance (SNH 2005a) states for Scotland in slightly more qualified tone:

"While it is often said that we live in litigious times, in practice very few liability cases relating to recreation and access ever get to court. From the few relevant cases in recent years, the majority have been found against the visitor, on the basis that they have to care for their own safety." (SNH 2008)

Communicating the complexity of law and liability to lay audiences is never easy, and requires simplification and the presentation of the analysis in a positive tone that strips out lawyerly hedging and nods to the inherent uncertainty (and circumstance specific nature) of law.

During our scoping study we heard positive and appreciative comments about this guidance - but also a perception that when addressed to certain interest groups who view the world very differently (e.g. some small farmers) such guidance, even if written in clear lay language, may either fail to make an impact at all - or may potentially be alienating if the assertion (based on rational, objective assessment) that there is nothing to worry about simply does not chime with the message recipient's (subjective) "gut feel" about his predicament. In this regard Wildavsky & Dake's warning is worth restating:

"It is not only that "the facts" cannot by themselves convince doubters, but that behind one set of facts are always others relating to whether business and government can be trusted." (p55).

Such analysis and guidance is necessary - but for entrenched sectors of the landowner community it might not, alone, be sufficient to change liability risk perception.

It is perhaps with this in mind that there has additionally been a focus by UK Government agencies in recent years upon funding, supporting and promoting

access expertise within stakeholder bodies such as the National Farmers' Union Scotland.

The rise of the internet and public sector initiatives aimed at working at "message spreading" directly within stakeholder groups may go some way towards offering the prospect of greater cultural penetration of the "low risk" message. Drawing on studies of the successes and failures of public information campaigns Grossberg et al (1998, p313) suggest that campaigns are most likely to succeed where the intended audience has been clearly identified, and the message targeted specifically towards them.

Accordingly, targeted message sending may increase the prospects for successful message penetration - provided that the target communities are prepared to be receptive to, and to trust, those messages in the form and content intended by the sender. However, as regards communities that "don't want to hear", many audience researchers now emphasise that messages are received (or ignored) by "interpretive communities" (Fish, 1980). By this view audiences are not passive, they individually and/or collectively impose their own meanings upon the message that they have received, aligning it with their own pre-conceptions and world-view. Put simply, communities that don't want to hear "the good news" may readily find ways to (subconsciously) block it out or ignore it. Understanding how such mechanisms operate (where present) may enable greater penetration of an accurate risk perception of landowner liability risk.

To our knowledge, no studies have been carried out to establish the degree of penetration of such messages, how the target communities themselves interpret those messages, and whether their view on landowner liability is accordingly altered by presentation of such guidance and assistance. Audience research may help inform future targeted campaigns, particularly if (as suggested by some of our respondents) expressed concerns about safety liabilities may actually be indicative of deeper anxieties, and framed in informal and local ways that are not readily accessible by written guidance or reassuring pronouncements of senior judges, academics, politicians and other public policy figures.

Finally, it should also be acknowledged that the rise of the internet does not automatically mean that public information has a greater chance of reaching its target audience than in the era of Lazarsfeld and Katz's research. Whilst the internet can act positively to channel messages direct to those who may otherwise be in a physically remote (and possibly an unreceptive) local community, by its nature the internet can also function to promote a plurality of meaning and interpretation rather than perfecting the "accuracy" of transmission of the official message. The ability of the internet to give voice easily to every shade of opinion, to establish interpretive communities for those views and to blur the distinction between opinion and fact are areas of concern to commentators like Keen (2007), whilst the internet's potential to contaminate public information and awareness has been investigated as a matter of public policy concern by, for example, public health officials who have sought to map the "epidemiology of consumer health information on the Web" (Eysenbach et al 2002).

4. THE POWER OF LIABILITY PERCEPTION

The previous chapters have outlined the role of policy and perception in influencing behaviour. We have shown how a consensus for avoiding unnecessary risk aversion has emerged, and how this culture has started to have its impact on the senior courts and judges. We have also shown that the "trickle down" of this policy should not be assumed to be instantaneous or even ever 100% successful - and that there are factors and variables that may prevent this message being applied and/or understood "at grass roots" level.

In this Chapter we look at the ways in which the more deeply embedded belief in an emergent "compensation culture" appears to work and persist.

4.1 The power of liability perception upon the public

4.1.1 *Claims consciousness - why do people claim?*

Whether a person would consider claiming compensation after an accident is likely, at least in part, to be influenced by the extent to which they are aware of a legal avenue of redress, and perceive that liability is imposed upon the landowner in relation to the circumstances of their accident. This "awareness" is known as "claims consciousness".

In this section we consider whether there is any evidence to substantiate a view that the public at large (or any section of it) is becoming more claims conscious.

Many studies have shown a deep level of ignorance about the law and legal processes across the lay population:

"A clear message that emerges from the study is...the pervasive lack of the most rudimentary knowledge about legal rights and procedures for enforcing or defending rights." (Genn 1999, p255)

and in particular, it appears that if the public have any image of the law at all, it is likely to be more framed by criminal rather than civil processes:

"The evidence of qualitative interviews in [Genn's] study revealed a depth of ignorance about the legal system and a widespread inability to distinguish between criminal and civil courts. As a result of this confusion about the work of the courts, attitudes towards the judicial system are strongly influenced by media stories about criminal cases and televised representations of criminal trials. The assumption that "court" means a criminal court contributes to the reluctance voluntarily to become involved in court proceedings in order to enforce or defend civil claims. respondents' views of the legal system often conveyed a sense of alienation from the institutions and processes of the law..." (Genn 1999, p247)

Those who perceive the rise of a "compensation culture" imply that society must be becoming more sophisticated in its lay understanding of law and legal

processes, and perhaps also less repressed by traditional notions of deference and a sense of collaborative community spirit.

Furdei (1999) interprets the rise of a litigation culture as a sign of a more general decline in trust (and deference) in British society:

"People who litigate are demonstrating their mistrust of their doctor, teacher, referee or nursery worker." (p32)

He suggests also that the decline in the respect for traditional figures and systems of authority (e.g. politicians, clergy and professionals) means that aggrieved individuals will be less inclined to channel their grievance through a communal, ameliorative process (e.g. writing to their MP) and more likely to individualise their complaint - and accordingly to take "the matter into their own hands" (and launch a claim for compensation).

In contrast, similar factors lead Smith (as director of the lawyer's lobby group "Legal Action Group") to claim that the rise of litigation mindedness should be celebrated, on the basis that:

"...high rates may well be a sign of an active citizenry, prepared to be vigilant as to their rights. Indeed, as economic and political forces reduce the scope for democratic decision-taking, we should expect rising levels of litigation." (Smith 1997, pp 9 & 10)

Indeed, in the 1960s and 1970s a consensus emerged that the then prevailing civil litigation system was providing insufficient recourse for claimants - that there was "unmet legal need" (Harris et al 1984, p47). This view came to influence policy makers and was "embedded" by the 1990s: a core aim of the Woolf Reforms was aimed at improving this "access to justice".

There is therefore a tension remaining within Government policy. Whilst there is a rhetoric of challenging (any) "compensation culture" and curbing the excesses of risk aversion, Government policy remains committed to streamlining civil justice and removing barriers to access to justice. In this vein the UK Government announced in 2007 that it was considering raising the £1000 cap on the personal injury claims in the small claims court - and thereby opening up that relatively informal and "do it yourself" forum to higher value personal injury claims. The Law Society's reaction to this proposal was that it would result in an increase in claims, as potential claimants will be enticed to claim by claims handlers, and will not have the caution and wise counsel of professional legal representation to assess their claim (Caplan 2007; Rogers 2007).

There is therefore a fundamental difference of opinion amongst commentators about whether (if claims consciousness is increasing) it is a good or bad thing. Applying Smith's perspective the rise of claim farmers, CFAs and "no win, no fee" claims services can be seen as empowering, but to Furedi they are anything but:

"Despite the claim of the legal professionals, litigation does not empower the individual. On the contrary, it places people in a dependent relationship to professional advisers" (Furedi, 1999 pii)

Rowe (2005 p19) offers an interpretation of increased claims mentality derived from Psychoanalysis - she posits a contemporary psyche in which in which:

"people find it impossible to accept that they live in a world where things happen by chance"

and in which the desire to look for authority (or other external persons) to blame reflects a desire for contemporary adults to remain in a child like state where:

"like all children they resent their parents interfering in their lives but at the same time they want to be certain that they are being looked after by their parents." (Rowe 2005 p19)

However, for activist-commentators like Monbiot (2004) the spectre of "compensation culture":

"is a convenient bogeyman, because it allows big business to associate its victims ... with scroungers and conmen. It also opens a new front in their perpetual war against regulation."

Monbiot notes that:

"compensation culture has usurped political correctness, welfare cheats, single mothers and new age travelers as the right's new bogeyman-in-chief"

and in his view, those who oppose an emergent claims consciousness are seeking to discredit the basic right to gain compensation which *'is often the only protection we have'*.

In a study written by the Citizens Advice Bureau (Sandbach 2004) entitled *"No Win, No Fee, No Chance"*, the CAB set out an analysis that argues that the arrival of CFAs (and the withdrawal of Civil Legal Aid) has actually put accident victims in a weaker position in litigation. The CAB argue that these changes have exposed accident victims to exploitation by Claims Management Companies and solicitors who are now structurally inclined to be more selective and ruthless about the cases that they choose to take on. In support of their argument the CAB point to evidence that the percentage of accident victims (based on RoSPA estimates) who actually proceed with a compensation claim has declined over the last 5 years (to 2004) to only 31%. They conclude that this figure shows the polar opposite of a compensation culture.

Indeed, even the Association of British Insurers shares the view that the personal injury compensation system is failing in that it:

"takes too long to get compensation to claimants, the legal costs are too high, and it undermines rehabilitation." (ABI 2008, p2).

4.1.2 Do all injured people claim?

Studies of personal injury claim behaviours do not present a consistent interpretation of what motivates people to claim (or not to claim). The following key studies have been reviewed:

1984 - Harris' study

Harris et al (1984) conducted a compensation survey in 1976 - 1977, this identified a screened sample of 2,142 persons who had recently suffered injury or illness due to apparent accidents (and who therefore were potential personal injury claimants) and then revisited their sample population after 6 months to interview them on whether or not they had proceeded to claim compensation. The study addressed all forms of accident - but greater focus was placed upon work and road accidents than other accidents. The study found that accident victims under 16 or over 65 rarely made compensation claims (NB: this appears to conflict with the findings of the HSE 2007 study which found some evidence of a particular willingness to claim in amongst the under 24s and the over 65s).

Harris et al (1984) found that 90% of those who claimed had discussed their accident with another (lay) person before deciding to make a claim - and 70% of those who did eventually claim had been given the idea of claiming by the suggestion of another person. Harris et al (1984, p65) conclude:

"...for most people who did attempt to claim damages, the informal discussions which took place before they sought formal legal advice were extremely important in providing or reinforcing the incentive to claim."

Harris et al (1984, p53) found that people from manual and non-affluent backgrounds were the most common claimants (confounding their starting hypothesis that access to justice issues would have concentrated claim-making to the more affluent social groups).

Harris et al (1984) identified an absence of a claims consciousness as the primary factor that deterred people from making a claim - the world of law, claiming and gathering evidence and other procedural aspects (together with fear of costs) were all sufficiently alienating to deter a claim by those persons.

Harris et al (1984, p151) conclude from their study that claimants are not motivated to claim by a desire to attribute fault - but rather that:

"the attribution of fault is a justification rather than a motive for seeking damages."

By this view claimants decide to seek compensation, and then rationalise that decision by adding on (to the extent necessary) a notion that the person against

whom they launch their claim has done wrong, is blameworthy or otherwise needs censure. This appears to contrast with the findings of HSE (2007) (see below).

Harris et al (1984, p153) suggest that the framing of an incident in terms of fault (and therefore a route to claim constructed in those terms) will be most likely to emerge in situations where there are clear normative rules about correct and incorrect behaviour. This helps to explain the preponderance of claims in road traffic and workplace scenarios. Here, people readily claim because there is an expectation of claims, a conventionality to claiming behaviours, but also a surrounding normative context that precipitates claims - for examples two insurers involved in a two part road traffic accident or a pending regulatory investigation in the context of a work accident. In such situations people may claim because they see it as an effective (or necessary) strategy to avoid a claim (or other blame or sanction) falling upon them.

Harris et al (1984, p159) remind us that a victim's perception and understanding of his own accident is not fixed - it is a fluid understanding, which may well change over time due to his own reflection and/or the way in which the incident comes to be defined and explored via subsequent examination by others. Here the re-contextualisation of the incident by lay advisers, , legal advisers and thereafter by the inquiries of media, police, medical and insurer personnel all play their part in shaping how the victim understands (and accepts quietly or crusades against) his accident. Therefore how the landowner contributes to this contextualisation of the incident is important.

Clearly much has changed since the Harris et al study. In particular Claims Management Companies now exist to encourage and support initiation of claims (and to grow claims consciousness).

1995 - NCC study

In 1995 the National Consumer Council interviewed over 8,000 randomly selected members of the public around the UK and investigated their experience (if any) of any civil dispute in the preceding 3 years. The study covered all forms of civil dispute - and therefore its findings were not targeted towards personal injury claims or motivations. Included amongst the study's notable general findings:

- the most commonly experienced civil disputes were injury claims and divorces;
- disputes (of any type) are a minority experience - only 13% of the sample population had experience of a civil dispute;
- experience of disputes was spread fairly evenly throughout the sample population - with no clear variation for age, income, gender or region;
- 77% of the sample had sought professional or other outside help to sort out their dispute; and

- only 33% of the sample population claimed that financial compensation had been their primary motivation and that:

"...people involved in disputes about accident or injury and about problems at work were particularly likely to say preventing it happening to others was most important." (NCC 1995, p10)

1996 - Genn's study

Genn's study of a random sample of 4,000 people in England & Wales in 1996 and Scotland in 1997 (Genn 1999) sought to investigate how people in reality perceive and utilise the civil law to resolve disputes that they may encounter. Detailed interviews were conducted with 1,000 respondents who revealed a manifest (non-trivial) legal need (for what Genn terms "*justiciable problems*"). Once again, the study was not restricted to personal injury claims, but the following relevant findings are reported:

- 9% of the 4,000 respondents had experienced an injury or illness which they attributed to an accident (7% if only those involving some degree of medical consultation are counted);
- 37% of those with experience of an accident related injury or illness decided to take no action (i.e. made no complaint or claim);
- most of those who took no action rationalised their decision on the basis that no one was to blame (56%), or that they regarded the incident as their own fault. Bureaucratic factors such as those encountered by Harris et al (1984) were also cited (e.g. complexity, time (3%), perceived non-existence of remedy (10%)), but Genn notes that very few respondents cited concerns about cost as their reason for not taking matters any further (only 1%);
- of the 63% who took matters further, the options selected were:
 - 44% contacted the other side to discuss the problem
 - 38% threatened and/or took legal action; and
- one in ten of the respondents (not just the personal injury respondents) sought advice first from a friend or relative.

Genn's conclusion about the pattern behaviour of accident victims is:

"Accident victims appear either to do nothing, or take action with the benefit of advice, usually from a legal adviser." (Genn 1999, p162)

From her study she finds little evidence of a sizable proportion of lay or "do it yourself" based response pattern to accidents (in contrast to Harris et al (1984)). It is notable that Genn was a core participant in the Harris et al (1984) study.

Genn's findings also counter Harris et al's findings in relation to the motives for claiming in accident cases:

"Not a single respondent experiencing accidental injury said that their primary motive in taking action was to receive an apology from the other side, despite the fact that this is often cited as a motivation for litigating." (Genn 1999, p185)

Genn's study found that only 6% of action takers cited a desire to prevent something happening again as their motivation (however Genn does note that these findings may have been skewed by the high number of work accidents and work related illnesses in the sample).

Genn concludes that there is a structural reluctance to bring claims:

"There is a widespread perception that legal proceedings involve uncertainty, expense and potential long-term disturbance and that only the most serious matters could justify enduring those conditions. Were there to be a revolution in public dispute resolution processes - and this means more than tinkering with procedures and small claims limits - public enthusiasm for mobilising the courts might increase." (Genn 1999, p254)

2007 - HSE Study

A study of "slips and trips" claims by the Health & Safety Executive (HSE 2007) found some evidence that the public and employees are less inhibited about reporting accidents than they were 10 years ago, and they are more aware of their rights and less tolerant of situations that they perceive as "unfair treatment". However it also found that litigation is still not usually their first action. The primary need of many (potential) claimants is for an acknowledgement (and often an apology) for their injury. The HSE's study found that the public were most likely to instigate compensation claims against organisations that they perceive as remote from them (and the HSE study cites "local councils") in this regard.

Accordingly, the HSE's study findings suggest that those managing claims need to appreciate that organisations that adopt a combative, legalistic and (as perceived) "uncaring" attitude towards those who have been injured may by their stance attract rather than deter claims. Therefore care needs to be taken to distinguish between adopting a robust approach to identifying and resisting unmeritworthy claims and sensitively managing expectations regarding genuine accident victims.

Clearly these studies do not correspond in all respects. In comparing the Harris et al (1984), NCC (1995), Genn (1999) and HSE (2007) studies it is important to appreciate that they were each undertaken for different purposes (and reflecting different embedded policy agendas):

- **Harris et al (1984)** - why people do or not bring accident claims - the embedded policy agenda being part of an academic law movement

favouring the introduction of a national "no-fault" based compensation system;

- **NCC (1995)** - what people who encounter the civil justice system think about it, and how access to justice and claims consciousness could be improved, in particular via citizen advice bureaus;
- **Genn (1999)** - whether people find the civil justice system helpful as a dispute resolving service - and how it might be enhanced to address unmet legal need and improve access to justice; and
- **HSE (2007)** - what factors influence minor injury claims rates - specifically, should the HSE regard the continued high level of "slips and trips" reporting as indicative of a failure of policy to reduce these accidents.

4.1.3 People are different - and have different risk tolerances

It is also credible to conclude that a visitor's personal view of risk and responsibility will be an important factor in influencing what degree of safety provision he expects landowners to provide in the countryside and whether or not he would be likely to bring a claim in the event of suffering an accident during a visit.

Commentators such as Ball (1995) consider the public to be:

"...fundamentally quite rational about safety and there is ample evidence that they recognise the need to trade safety considerations off against other factors including cost, convenience and so on, in reaching decisions about how resources should be allocated."

Ball (2002) cites research studies pointing to the importance of children's own interpretation of their playground accidents - noting that 30% view them as avoidable if they had acted differently. Ball also highlights the apparent importance of parental risk-instruction styles, and the extent to which behavioral discipline that is not based upon explanation and development of risk self-appraisal and management will adversely affect behavior (and success) in use of playground equipment.

Backett - Milburn and Harden (2004) apply a social constructionist analysis in their study into how children and their families construct and negotiate risk, safety and danger. The social constructionist perspective seeks to identify how individuals build and evolve perspective through social interaction. Their study shows how:

"risk, safety and danger are not fixed but shifting entities which are reconstituted and negotiated everyday through interaction in families."
(p430)

in short, that family attitudes and interactions influence the ways in which children learn about, perceive and address risk.

But an increasing challenge may lie in the fact that children are becoming less likely to be growing up with an experience of outdoor play and the personal safety skills that would otherwise instil. Research by Madge (2006) shows that only 20% of children now play outside and in the spaces where they live - compared to 70% of adults surveyed who recalled playing in such places during their own childhood. Such persons, if and when they in later life are enticed to the countryside may be less capable of looking after themselves and/or may have a higher expectation for safety to be provided to them by the landowner than more "traditional" countryside recreation seekers.

Conversely, key dangerous outdoor pursuits organisations are very keen to publicly declare that they regard their sports as having inherent dangers which participants must take personal responsibility for example the International Mountain Bicycling Association (Burghardt 1996) and the British Mountaineering Council, whose Participation Statement (quoted in Barlow 1995) stated:

"The BMC recognises that climbing and mountaineering are activities with danger of personal injury or death. Participants in these activities should be aware of and accept these risks and be responsible for their own actions and involvement."

Rowe (2005) reminds us that people are individuals - and that each will interpret an environment uniquely, seeing different levels of risk, blame and responsibility. Those who seek to provide "reasonable" safety at a site are having to try to anticipate and address that multitude of different perceptions of the same place - and those diverse orientations may not be reconcilable. Attempts at safety produce consequences (and potentially new risks for some or all visitors):

"no matter how wisely and imaginatively designers and architects create a public space, each person who encounters that space will interpret it differently and consequently use it differently." (Rowe 2005, p13).

In support of this contention Rowe quotes landscape architect Kathryn Gustafson, the designer of the Diana Memorial Fountain:

"I feel we made a mistake in letting people walk in the water. I apologise for that. I thought people would picnic near the memorial, and run their hands through the water, think about their lives, think about Diana...[but] when it first opened, 5,000 people an hour came to see it. How could you anticipate that? How can you solve a problem like that quickly? The turf around the oval couldn't survive those numbers." (Jeffries 2004)

Ms Gustafson also revealed to the Guardian that she had not anticipated that people would want to walk in the fountain, that visitors would allow their dogs to enter the water or that rubbish would be thrown into it.

In short, the place manager can only go so far to present a place that has been rendered "safe". The essential vagaries and uniqueness of human actors means that the possibility for danger, accident or otherwise unsatisfying experience of a premises or place will always remain as a possibility. Accordingly there will always

be a risk that someone will take exception to the level of safety that was provided to them - and therefore the risk that a claim might be brought cannot be eliminated entirely.

4.2 The power of liability perception upon policy makers

As we have seen in Chapter 3, an anxiety about the perceived effect of the rise of a compensation culture and a risk adverse society has led to the emergence of a strong consensus amongst political and judicial figures aimed at (re) introducing clear messages of personal responsibility back into rules and discourse of landowner liability and countryside access.

In reflection of this we see calls for personal responsibility:

"...the law also puts a duty on individuals to take reasonable care for their own safety, and reasonable steps to reduce the cost of any damage that others cause them." (UK Government 2004)

"when informed adults choose voluntarily to expose themselves to risk and/or take responsibility for managing risk and their behaviour does not harm others, the government should not intervene." (BRC 2006, p31)

We see calls for greater adventure / risk tolerance:

The Better Regulation Commission recommended that Government policy should be re-oriented towards:

"emphasis[ing] the importance of resilience, self-reliance, freedom, innovation and the spirit of adventure in today's society." (BRC 2006, p38)

And we also see calls for more bullish defence to compensation claims:

"while Government cannot determine the commercial pressures upon them, we want to encourage local authorities and their insurers to resist bad claims if they are made. Where state bodies are involved, we will do our bit to resist such claims, because not doing so only encourages more bad claims to be made." (UK Government 2004)

2006 also saw the introduction of legislation to regulate Claims Management Companies and their advertising.

But such stances also include a call for balancing alongside longstanding drives towards *increasing* claims consciousness (in the form of "legal need") and procedural efficiencies:

"If we want to stop, for example, local authorities closing down sensible activities because they unrealistically fear litigation then people need to be confident that the system is fair and that it will deliver proportionate dispute resolution." (UK Government 2004)

Government policy is not (nor could it ever be) solely concerned now with averting people from litigation. As Rogers (2007) notes, the spirit of the Woolf Reforms lives on and in 2007 the UK Government consulted on procedural changes to the civil litigation process that, she reports, in some commentator's view could lead to a 40% increase in the number of small claims for accidents that are dealt with informally (either within the lower courts or nudged into settlement "out of court") via relaxed evidential and procedural requirements. The Government's primary aim remains the efficiency of the civil litigation system as a compensation and claim settling machine, rather than as a control gate to deter litigation or to rebuild a sense of personal responsibility, adventure and/or beneficial risk taking.

4.3 The power of liability perception upon land owners and managers

In this section we summarise the key alleged impacts of fear of landowner liability - and the extent to which there is currently any evidence to support or refute such views.

4.3.1 An increase in the cost of public liability insurance?

There is a perception that public liability insurance is becoming harder to obtain. This impression is itself utilised by some insurance brokers, for example to following website advert:

"The subject of insurance for outdoor centres and outdoor professionals has been brought into sharp focus over recent years. High profile incidents and the growth of what some see as a litigious [sic] society make the right choice of insurance cover a key item." (Leisure Insure 2008)

The Better Regulation Commission (BRC 2006, p16) cites as a case study the experience of a charity, called "Cathedral Camps" which for 25 years had given young people to opportunity to help repair historic buildings. However, despite no volunteers having been injured throughout that period, the charity was forced to disband in 2006 due to escalating insurance costs.

Another unsubstantiated assertion is to be found in John Adam's contribution to CABE Space's 2005 publication on the impact of risk adverse culture upon urban environment design and management:

*"Mistrust also afflicts those who plan and maintain our streets. As escalating insurance premiums attest, they are fearful of personal injury claims caused as a result of the state of the street. **Both those planning and maintaining the streets and those using them are becoming more risk adverse.**"* (Adams 2005, p38 - emphasis in original).

A study of the impact of the "compensation culture" on the voluntary sector (Gaskin 2005) reports that the British Trust for Conservation Volunteers (BTCV) was forced to suspend work by two thirds of its 2,600 volunteer groups after its liability insurer withdrew cover. This withdrawal was apparently due to the insurer discovering the full range of activities which the BTCV was involved in (and hence the different level of risk than the insurer had believed existed). In the aftermath

BTCV estimate that between 20-25% of their groups closed, unable to meet the new premium levels offered by the new insurers. However this withdrawal appears to have been triggered by specific circumstances - a large public liability claim having been made against one of its groups (and the course designer and local council) following an accident on a BMX track in York (Gaskin nd & 2006).

However a study by Savills on behalf of Scottish Natural Heritage investigated the insurance industry's perception of risk in outdoor access (Savills 2008) and concluded that whilst there was evidence of a rise in public liability insurance premiums since 2000 this was an industry-wide phenomenon reflecting a combination of factors including the 11 September 2001 terrorist attacks, technical court ruling that altered regulatory requirements for how insurance companies maintain their reserve levels, escalating asbestosis and lower returns in insurers' investments around the world.

The rise in premiums had nothing to do with access legislation. Savills interviewed six insurance brokers in order to identify how policies are written and priced for the outdoor recreation market. Savills found that the liability market is reactive - policy terms and or premiums are only revised if claims evidence shows an increasing claim profile. No such profile had been observed by the underwriters, thus no specific attention has needed to be paid by them to whether (and if so how) public liability insurance cover is made available for outdoor activities. This underwriting approach was confirmed by the underwriter interviewed as part of our scoping study.

It will be recalled that we have reported earlier that there may be some evidence to suggest that public liability costs for equestrian insurance have increased at a higher rate than the general market due to concerns about the House of Lords judgement in the Mirvahedy case. Some anecdotal evidence of the impact of that case upon insurance levels in this sector is given in Sims (2007).

4.3.2 An increase in the cost of claims management?

There is a common assertion that a rising level of claims is imposing an ever increasing administrative cost burden upon landowners. For example: the Better Regulation Task Force (BRTF 2004) asserts:

"It is this perception [of the existence of a compensation culture] that causes the real problem: the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims". (p3)

But the Task Force's report provides little concrete illustration of these impacts. Its only proof for the "cost of claims" is a single anecdotal (and unattributed) reference to:

"One large council we spoke to estimated that this year it would spend over £2 million of its highways budget of nearly £22 million handling claims for compensation". (p3)

The only evidence that we have found to substantiate this assertion is evidence from an LGA and Zurich (2004) survey which found that in response to the rising level of claims received following introduction of CFAs a third of local councils have felt it necessary to invest in modernising and enhancing their claims handling processes - and that this has been particularly evident (50%) in the North West of England (the region recording the highest growth rate in claims).

Because of its private nature (as discussed above in Chapter 2, section 2.4.5) there can be little direct insight into the extent to which out of court settlements form a large or small part of the experience and management of claims by landowners. All that we are able to say from our scoping survey is that the organisations surveyed considered that they had fairly robust stance in relation to claims - and were not motivated by a desire to keep claims out of court at all costs. However where liability appears clear then settlement of that claim without incurring the costs of formal litigation (to force the claimant to "prove their claim") would be a rational course of action even in an organisation that did not wish to be seen to be a "soft touch".

4.3.3 An increase in fraudulent claims?

"The number of people claiming against the [Trafford Centre Shopping complex] is negligible in comparison with the number of customers, but we are exasperated and amazed by some claims. They reflect the compensation culture which is fuelled by the advertising campaigns claiming "no win, no fee". Many claims are blatantly fraudulent."

Steve Bunce, Operations Director of the Trafford Centre (quoted in Wainwright 2004).

The insurance industry has expressed concern about a rising level of fraudulent insurance claims - which may indicate a sign of something happening in the attitude of people towards litigation. The Association of British Insurers (ABI) claims that one in 11 claims is false, three times as many as in 2003 (with false household insurance claims accounting for over half of these) (BBC 2007). Insurers and local government claims departments have introduced sophisticated fraud detection systems. Fraudulent motor insurance claims are reported by the ABI to have risen 70% during the last three years (Channel 4, 2008), with evidence that this behaviour may rise as the credit crunch bites.

London Borough of Sutton is reported (LBS 2007) to have set up a 24 hour hotline on which the public can report fraudulent claimsters and also erected posters around its borough warning that fraudulent claims are a crime - fraudulent and exaggerated claims being thought to account for 30% or more of the claims made against it.

The case of Gordon Thomson (de Bruxelles 2007), a Plymouth man who was convicted in November 2007 of breaking his girlfriend's leg with a brick in an attempted insurance fraud marks (one would hope) only the eccentric extremity of fraudulent behaviour. Mr Thomson's girlfriend had seemingly consented to the injury - the plan apparently having been to submit a claim to the local council alleging that the injury had been caused by collapse of a council-owner wall. The

fraud was discovered when police viewed a video of the incident on Mr Thomson's mobile phone whilst investigating an unrelated matter.

Save for the likes of Mr Thomson, and as one of our local government respondents noted during his telephone interview, faking claims of slips, trips or other physical injuries in the countryside must surely be a relatively difficult type of claim to undertake. As the ABI's own comments above would appear to show, claims fraud is likely to stay concentrated in household and motor insurance claims.

4.3.4 An increase in the cost of land management?

A related claim is that the rise of a compensation culture sees public resources being diverted from public good to private gain or sheer waste:

"The present system of litigation is arbitrary and unfair. It represents an unacknowledged tax on the British public and it deprives the public services of resources which could otherwise be used to improve the public services."
(Furedi 1999 pii)

Ball (2002) in reviewing the impact of the setting of tougher surfacing standards for playgrounds quotes a Royal Society for the Prevention of Accidents spokesman (speaking in 1995):

"In the UK the cost of surfacing has resulted in equipment being removed, playgrounds closed and only small amounts of items being purchased for new playgrounds - and all without much evidence that it is effective in reducing any accidents other than the extremely rare direct head fall." (Ball 2002, section 7.5)

Landry (2005 p7) notes the way in which the rise in claims against highway authorities has led them not just to enhance their inspection and maintenance regimes - but also to adopt:

"a culture of maintenance which is now conducted specifically with the avoidance of claims in mind."

Landry cites the example of Leeds City Council as an authority which targets areas afflicted by claims clusters, singling these out for special attention.

Such a practice is reminiscent of "defensive medicine" - where medical judgment become distorted by (or at least subordinate to a primary focus in avoiding litigation).

The physical consequences of successive interventions into the environment in response and reaction to incidents is noted by Adams (2005) in his description of the proliferation of road markings and warnings signs, noting such scenes unplanned and organic accretion thus:

"[the] signs, signals, barriers and road markings are not the work of any single planner; they are the cumulative result of numbers of uncoordinated interventions...[and] the primary justification for almost all the clutter will be safety..." (Adams 2005 p39)

Furthermore, this build-up of signage and other "safety" inspired street furniture may actually reduce the safety of that area for blind and partially sighted persons who are then at risk of collision with these structures (CABE Space 2007 p36).

The conflict between defensive estate management and other priorities are illustrated well by recent developments in local authority management of cemeteries. In an unpublished study Gibbeson (2008) investigates the factors affecting five comparable local council's approach towards the management of memorial safety in municipal cemeteries. Following the fatal crushing of a six year old child in a Harrogate cemetery in 2000, many local burial authorities embarked upon programmes of "topple testing" of grave and other memorial structures, and as found by subsequent investigation:

"Spurred on by concerns of public safety, many local authorities saw laying down as the immediate solution to the risk posed by unstable memorials. This work was often done without any consideration of degrees of risk or the effect on the public when scores or even hundreds of memorials were laid flat. The hurt was often compounded by failures of communication before and during the testing process." (CLAE 2006, p13).

Memorials that were at risk of toppling were either cordoned, laid flat, staked or internally doweled. Zealous (i.e. particularly risk adverse cemetery authorities) soon encountered a wave of local protest, and consequent unwanted media attention, for example the following headline from the Sun in September 2004 (CLAE 2006):

"Desecrated. 372 tombstones felled...but not by louts...this time it's council morons."

As reported by CLAE 2006, a number of complaints against burial authorities' remedial programmes were made to the Commission for Local Administration in England (the "Ombudsman"). In response the Ombudsman's report seeks to curb excessively risk-adverse reactions by burial authorities with the clear warning message to local authorities that:

"Our main message is simple. In our view it should not be necessary for burial authorities to lay down grave memorials on any large scale." (CLAE 2006, p3)

Gibbeson's investigation of current memorial safety management practices found that each Council surveyed had constructed its own individual perception of the significance of this "new" health and safety issue, and the extent of what needs to be done in response to it. In the face of an absence of national guidance on memorial safety standards Gibbeson found that four of the five local authorities

adopted their own pragmatic stances - each finding their own unique balancing point around the competing issues of sensitivity / public relations, litigation avoidance and budgetary pressures.

However in Gibbeson's fifth local authority (which she does not name) a fear of litigation came to dominate over all other considerations. An aggressive policy of toppling and staking / laying down was maintained - leading to significant and sustained local animosity and adverse publicity. Gibbeson's study found no single clear causal trigger for that local authority's extreme reaction, compared to the other comparable authorities who had (in various ways and degrees) adopted a pragmatic and balanced policy on memorial management. It would appear however that personal and organisational interpretations and cultures of risk and liability were more powerful in shaping the extent to which an aggressive remedial policy was employed - rather than any physical factors relating to the locality, the condition of the cemetery as a whole or the level of risk actually presented by it.

4.3.5 Is access affected as a result of the fear of litigation?

Commentators assert that fear of safety litigation drives landowners to choose to withdraw access to their land. Such assertions are easily stated (but rarely backed by concrete examples):

"Some councils are so worried that they might be sued by parents of children injured "conkering", that they have implemented a policy of "tree management" to make horse-chestnut trees less accessible to children. Diminishing the childhood experience of playing is one adverse outcome of the institutionalisation of litigation avoidance." (Furedi 1999, p31)

having made the general assertion, commentators then usually swiftly move on to address institutionalised forms of risk adverse behaviour - and what might be done about it. We return to the theme of access denial in the next Chapter.

In our telephone survey we only came across one instance of countryside access (to a footpath) being withdrawn for "health & safety reasons". This example was independently mentioned by two respondents - each of whom suggested that the path closure actually appeared to them to be motivated by a property dispute.

4.4 What mature (public) risk management looks like

4.4.1 How to spot and tackle risk adverse cultures within organisations

In its report (BRC 2006) the Better Regulation Commission sets out an analysis of risk adverse organisational culture within Central Government and proposes steps to reshape that culture. The analysis offered there can be applied also to private and public sector organisations who manage land.

The Commission's analysis suggests that organisations which have an exposure to public complaint or claim:

"have a strong cultural imperative, supported by formal and informal incentives...to seek to control all risks" (BRC 2006, p23).

The Commission attributes such behaviour to the following organisational traits:

- that many policy setters have a legal background - which instinctively inclines them to seek prohibition or rule setting solutions to problems rather than looking for more positive alternatives;
- a perceived need to respond decisively and swiftly to accidents and other unfortunate events - rather than taking no action;
- inadequate training for staff in managing and communicating risk;
- discomfort and/or lack of any experience in using scientific and economic data to undertake objective risk based analysis to determine whether prohibition or rule setting interventions are needed (or justifiable);
- failure to think through in advance the potential adverse "knock-on effects" that a regulatory intervention may have;
- perpetuating a mode of management that identifies the organisation as responsible for management of all risks - and one which appears to absolve the individual (user, visitor etc) of any personal responsibility to take care for their own safety; and
- failure to reward risk taking and/or endorsing risk adverse behaviour.

In regard to this final item the Commission was pleased to discover that Sir Gus O'Donnell, Head of the Home Civil Service is seeking to encourage civil servants to *"ask forgiveness not permission"* (BRC 2006, p25) and thereby break away from risk adverse and bureaucratic patterns of management by encouraging a culture of personal responsibility and controlled risk taking.

Groves (2006) notes that classic studies of risk perception show that a person's toleration of risk is suppressed by the following factors:

- Are they exposed to the risk without choice?
- Do they (feel they have) any control over the outcome?
- There is an uncertainty?
- Do they have any prior personal experience of the risk? - is there fear of the unknown?

Conversely where the benefits of taking the risk are clear - and they benefit through taking that risk, people will be more risk tolerant.

Whilst Grove tables these factors in the context of explaining the variability of risk tolerance in *visitors* - the model can be directly applied to help understand why different types of landowners may well demonstrate markedly different levels of landowner liability risk tolerance.

Whilst large public agencies with access and recreation remits can intrinsically "see" the benefits to be gained by embracing the public risk consensus there is no incentive for the private landowner to see his circumstance in these terms. Instead, he may view himself as powerless in the face of an imposed risk (the visiting public), facing uncertainty about how to deal with that risk (in part due to the inherent uncertainty of the law) and being forced into an alien world that he has no prior experience of or taste for.

4.4.2 The impossibility of total safety

We should also not rule out the role of simple misunderstanding of what is actually required in relation to visitor safety management. As the former Lord Chancellor put it:

"risk-adverse behaviour does not just stem from fear of litigation. It can arise from people simply not understanding what they should do in terms of risk management." - Lord Falconer (November 2005) (Falconer 2005)

Rowe (2005) from her Psychoanalytical perspective asserts that:

"There can be no optimum balance of freedom and security in a public place because each person who uses that space will have a different view of what constitutes the right balance." (Rowe 2005, p19)

She suggests that the best that can (and should) be aimed for is a middle position where no one type of personality will feel unduly constrained or unduly exposed to danger.

The question then arises: how should such places of (residual) danger be described?

Ball (2002) suggests that labelling playgrounds as "safe" is potentially misleading - by their nature they cannot be made entirely risk free. He suggests that playgrounds could be rated in terms of their riskiness - enabling guardians to reach their own judgement upon the level of potential danger they are prepared to expose the children in their care to. However the communication of what each rating means could be a cumbersome (and ineffective - in terms of recipient understanding).

Jones (2007) notes the findings of a 2004 HSE study into the delivery of risk education in schools which appears to show that there is a basic lack of understanding about risk. The study found that that whilst teachers believed that they were teaching risk concepts effectively - in reality they were failing to distinguish between risk management and risk education. Accordingly equating risk education with risk management fails to project the positive and unavoidable

dimension of risk, passing on to students instead the perception that risk can and must be eliminated via avoidance or other intervention.

By analogy, focus upon risk management, without a corresponding conversation about the "positive" (and unavoidable) nature of risk within land and place management organisations will deliver unnecessarily risk averse, defensive styles of land and place management.

4.4.3 Tree safety: a case study of public risk

Recent heightened anxiety about tree safety is a good example of a public risk debate - it also illustrates many of the themes and processes outlined in this report.

As Haythornthwaite (2008) notes, there is no suggestion that trees have suddenly become more dangerous. But as a consequence of a few court cases anxiety about the potential for landowner liability for injury caused to the public has increased, and a public risk debate is needed in order to calibrate what is (and is not) the correct standard of care to be employed.

In Poll -v- Viscount Asquith of Morley (2006) EWMC 2251 - High Court, a private landowner was held liable for injuries sustained by a motorist crushed when a diseased tree fell onto a public highway. The Judge found the landowner liable on the basis that a landowner was negligent in not ensuring a regular inspection of its trees by a sufficiently competent person.

In 2007 a Greater London Assembly report (GLA 2007) noted that between 2002 and 2007 33 London Boroughs removed 30,000 street trees, 75% of these removals being for "health and safety reasons" (although in this context "health and safety" appears to include trees with evident damage and disease, it cannot be said that all such removals were an excessive, risk -averse reaction to abstract and overstated liability fears).

In the face of a perceived rise in the anxiety level about trees as a public risk issue, stakeholders have pressed for development of a consensus about what constitutes a "reasonable" level of tree safety inspection. A draft standard has been produced by the BSI British Standards (BSI 2008) and at the instigation of the Forestry Commission and others a "Tree Safety Group" was formed to represent tree owners and managers interests in that process. In May 2008 that group convened a 300 strong stakeholder conference to debate the issue in the spirit of "*non-defensive arboriculture*" (Fay 2008) and with the aim of setting standards that counter the perceived "ratchet effect" caused where standards are left to be set via court action and individual landowner uncertainty.

The conference testified to the diversity of lay and expert perspectives upon trees and their perceived social value, as Papastavrou (2008) notes:

"one person's ancient hedgerow tree and a remnant of a former landscape is another person's misshapen tree with two trunks not worth saving: value judgements influence attitudes which in turn influence outcomes."

Haythornthwaite (2008) notes however that the setting of a technical standard for inspections may not leave the matter entirely certain (and therefore reduce apprehension of liability to an appropriate level), the fixing of a legal "standard of care" is not an entirely rational and predictable process:

"This requires the judiciary to accept the [BSI] standard. Evidence suggests that the judicial system has the capacity to throw into disarray a matter that has been settled for decades. The creation of a standard is unlikely to change this situation."

This leads us back to the issue of law's inherent uncertainty and unpredictability. This risk factor can be reduced (e.g. by taking the trouble to agree an industry-wide standard) - but it can never be eliminated.

5. WHAT EVIDENCE IS THERE OF AN EFFECT UPON ACCESS?

5.1 The role of anecdotal evidence

Finding reliable evidence of risk adverse behaviour is difficult.

As has been shown in the preceding Chapter, it appears a standard feature of this debate that impacts upon access and land management are evidenced only by reference to vague (and often untraceable) anecdotes.

Commentators would contribute more if they:

- provided more detail (it is easy to parody through simplification / generalisation); and
- identify the concrete origins (i.e. source) of their stories - this is important lest commentators otherwise reproduce "urban myths" and add themselves to the amplification of anxiety that they criticise the media for.

The dangers of reliance upon anecdotal evidence is illustrated by the example of press reports in 2006 of Torbay Council's risk adverse stance on the planting of its signature "palm trees". The story (for example Savill (2006)) had it that the Council's Senior Urban Design and Landscape Officer had blocked the planting of these trees in pedestrian areas because:

"as they have very sharp leaves, [they] need to be carefully sited in streetscapes, where they could cause injury to eyes/faces if inappropriately placed." (Savill 2006)

In the local political spat that ensued, commentators lampooned their official's stance, either intentionally:

"Torbay Council's elected mayor, said he did not think that there was any risk from palm trees unless "you were in the Caribbean and a great big pineapple fell on your head"." (Savill 2006)

or unintentionally lampooned their official whilst trying to support him - by attempting to explain that such trees could be dangerous, a local Councillor drew an unfortunately colourful metaphor:

"Its a bit like keeping tigers: they are beautiful to look at but you wouldn't want them wandering the streets." (Savill 2006).

These sound bites reinforce the view of this story as an instance of the "nanny state" gone mad. However buried away within the story are hints that the article was less clear cut than this. But only a careful reading would spot these more mundane signals. It is not that the press reports were inaccurate - but rather that it is the most salacious elements that stick in the mind of the reader. As part of our scoping survey for this report we traced and interviewed Mr Osborne, the Landscape Officer involved (he now works for Exeter City Council). He was able to

explain that the story had its origins in a very specific local planting decision. His aversion to planting the palms, was part of a rational risk assessment. It was not inspired by a fear of litigation or a risk-averse culture within that Council. The decision related to the request for these palms to be planted at one specific shopping precinct location - one where there would have been a real risk of eye level contact between public and sharp fronds. As the article mentioned (but only subtly, and in passing) the Council had not stopped planting these trees at all locations, there was no general issue of policy imposed here. In Mr Osborne's view the national press had picked up on this story from the local press (where the clash of stakeholder views was of local political consequence) because of its colourful quotes, and had portrayed it within a new, wider context, that of a "nanny state" discourse.

Another national press story, concerning Swansea City Council, appears to say it all in its title -

"150 year old Monkey puzzle tree facing chop because council says its needles are "like syringes." (Hale 2008).

Once again the use of a rather emotive metaphor by a Council spokesman gives ready opportunity for ridicule of the Council's decision. But we suspect that there is more circumstance specific context to the Council's decision than the report reveals.

During our telephone survey a local government respondent illustrated the mutating effect of such reporting. As an example, he suggested that many stories that allege that Councils have banned conkers for "health and safety" reasons are either an urban myth - or that such bans have been instigated by some Councils but not for blanket "fear of litigation" reasons. Such decisions might more likely arise from a legitimate desire to control other undesirable behaviours that may relate to conkering: for example trespassing to obtain conkers, playground disputes over conkers or theft of conkers.

The use of anecdotal evidence needs to be treated with caution. But evidence does need to be found - otherwise a claimed link between fear of liability and curbing of use or land or access to it is merely an assertion, bordering on ideology or prejudice.

5.2 Existing studies on landowners' attitudes to access

There has been little research in the UK upon the role of fear of liability in shaping landowners' attitudes to access. The limited UK evidence that we have found suggests that fear of liability may be a much lesser influence than perceptions of privacy and control.

A study of woodland owners' attitudes to access in the South East of England by the University of Brighton 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 is allowed. These privacy and control issues 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.

Given the lack of UK studies on this alleged relationship between liability risk and recreational access to land issue we have looked for comparable studies in other countries.

5.3 International perspectives and developments

5.3.1 The limits of our international enquiry

Within the constraints of this project it has not been possible to conduct an extensive investigation into perspectives and experiences of claims consciousness and fear of landowner liability outside the UK. In the following sub-sections we report on the limited research that we have undertaken in this regard. It has been confined to United States and New Zealand sources, and does not purport to be a comprehensive review. However we consider that reference to research and/or legal and policy experiences in these jurisdictions can be helpful illumination, given the broad cultural and common-law similarities with the UK jurisdictions.

5.3.2 The US experience

There have been a number of US studies that have sought to investigate the role of landowners' fear of the risk of landowner liability as a deterrent to providing recreational access to their private rural land (e.g. Teasley et al (1997), Gentle et al (1999), Wright et al (2002) and Henderson (2007)). Pertinent findings of these studies are summarised below.

Whilst there are similarities in the legal systems in relation to the common law rules of negligence in the UK and the US states, there are also important differences that have been introduced, specifically in relation to recreational access and landowner liability which need to be appreciated when reviewing US access research.

As a conscious policy decision aimed at increasing the amount of recreational land open for access to the public, US Federal and State authorities have sought to create a policy and legal framework that has aimed to reduce (and render clearer) the scope of landowner liability. Over the last 30 years each of the US States has enacted its own bespoke version of a "Recreational Use Statute" (RUS). The aim of a RUS is to expressly modify common law principles, and to leave the landowner without liability in the event that he allows recreational access to his land and a visitor is subsequently harmed there. In short, no duty of care arises. Each State's RUS is different - and some are more restricted in their liability waiver than others. Some, for example, do not apply if the landowner is providing access in return for a fee. Most leave scope for a landowner to have liability in the event that it acts recklessly (i.e. fails to warn of a hidden danger of which it is aware).

However (as noted and endorsed by the International Mountain Bicycling Association (Burghardt 1996)) the intention behind RUS' is to stress "personal responsibility" for the activities that the visitors choose to engage in.

Unlike the UK position, US law does not impose liability upon landowners for accidents to trespassers.

The development of RUS was in part an attempt to reduce the amount of "posting" of land. "Posting" involves the affixing of signs, the effect of which is to deny access to the land, and give rise to a (minor) criminal offence if trespass occurs. Allen et al (1998, p3) explain that "posting" in West Virginia is defined as:

"...maintaining signs along the property boundaries at no more than 500 foot intervals. Signs must be posted at every corner. Each sign must contain the words "NO TRESPASSING" in letters at least two inches high, and the name and address of the property owner or lessee."

RUS means that the landowner need not engage in posting in order to reduce his liability risk. Prior to RUS being introduced, posting made it clear that land was "off limits" and that therefore any person entering it was a trespasser, and accordingly owed little or no duty of care by the landowner. However in most states RUS declare recreational users to be equivalent to trespassers (in terms of the duty of care owed to them).

Accordingly, in comparison to the generic vagueness of the UK law, the US liability framework (as modified via RUS' and "posting") presents in principle a much clearer and reassuring picture for landowners about the limits of landowner liability for visitor safety in the countryside.

However, the research findings appear to show that these legislative signals have failed to make much of an impact upon landowners, in terms of their perception of the level of landowner liability risk. As Wright et al (2002, p189) conclude:

"Research indicates that landowners and a number of resource management professionals are not aware of the significant liability protection afforded by recreation-use statutes."

In support of their view that RUS awareness was low amongst resource management professionals (by which they mean conservation and countryside managers) Wright et al cite a 2001 study that had found that only 29 of 50 State wildlife administrators who had been asked whether their States had legislation minimising landowner liability had been aware that their State did. Henderson (2007) quotes Kaiser & Wright's (1985) view that the RUSs have been "splendidly ineffective" in increasing public access to private lands. Henderson's own research findings found that over 75% of his sample of Lower Mississippi Delta landowners agreed with the statement "I am very concerned about the liability issues associated with allowing people on my land".

Henderson's study found that his respondents:

"...continually indicated that they are unsure about liability, insurance and legal issues associated with recreational use of their land." (Henderson (2007) p34)

Henderson reports that less than 8% of his respondents knew it to be true that legislation (i.e. Louisiana's and Arkansas' RUSs):

"...protect landowners from liability claims that may result from recreational use of their land so long as they do not charge a fee." (p36)

Around 70% of his respondents were "unsure" of the correctness of this statement, and around 20% considered it to be false.

Wright et al (2002) point to the need for steps to be taken to raise this level of awareness and thereby to counter landowners' fears which appear to be based on a disproportionate perception of the level of liability risk that they would face if they were to open up their land to public access.

Wright et al (2002) examined the structure of each US State's RUS and each State's reported levels of landowner liability litigation (a total of 637 cases). Whilst they found wide variance in the number of cases arising per State (a distribution which did not always bear any relationship to the State's size, land ownership structures or the content of its RUS) Wright et al were unable to identify any clear trends in this data about what factors appear to influence landowner liability claims.

Gentle et al (1999) set out to examine whether the different political and cultural heritage of various US States influence landowners' attitudes towards provision of access. Like Wright et al they find 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), p57)

Gentle et al (1999) (echoing conclusions also reached by Teasley et al (1997)) note that a history of *"unpleasant experiences with recreationists"*, 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 post their land.

Teasley et al (1997) find respondents giving a variety of reasons for posting - 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".

The inconclusive findings of these US studies would appear to bear out Brown et al's (1984) conclusion that it has been:

"clearly shown that most landowner characteristics are poor predictors of posting behaviour."

Teasley et al's (1997, p80) study is based upon a review of data obtained by the (US) "National Private Landowners Survey" (NPLOS). NPLOS included enquiry into the methods by which landowners who lease their land for a fee (and therefore may in many States fall outside of RUS protection) choose to manage their risk. Their Table 40, setting out this data is reproduced below (with minor changes to Anglicize it), and whilst shows some North vs South divergence (and note also that none of the respondents felt confident enough to suggest that they had managed to remove all known hazards in the Rocky Mountains!):

Liability handling technique	US overall	Regions		
		North	South	Rocky Mountains
Landowner carries insurance	44.1%	73.6%	36.0%	36.7%
Tenant carries insurance	48.8%	53.5%	49.0%	25.1%
Tenant signs waiver	26.5%	27.2%	26.9%	17.1%
All known hazards removed	20.9%	18.6%	22.9%	0.0%
Do nothing about liability risk	14.8%	5.3%	16.8%	25.1%

A "waiver", is a written document that expressly records that the Tenant has irrevocably agreed to be responsible for his own safety at the premises, and will not hold the landowner accountable in any way if he suffers harm there. In most circumstances - but not all - a court will uphold a waiver as a clear indication of what the parties intended - and therefore whether or not any duty of care was created for the landowner in relation to the tenant.

Accordingly the US experience would appear to show:

1. That it is difficult to identify clear causal factors that differentiate levels of landowner liability anxiety;
2. Due to a widespread lack of understanding of the law, alteration of liability principles will not necessarily result in a change in landowner perception of the risk or alter his risk averse behaviour - unless each landowner actually "gets the message"; and
3. There is a disconnect between policy and "on the ground" experience. To change behaviour of landowners (as Wright et al (2002) note) landowners need to be made more knowledgeable about the reality of the level of risk they actually face, and field staff in public agencies who have direct contact with such landowners need, themselves, to have a clear and accurate understanding of the reality of the risk level actually faced. This is because those personnel (rather than legislators or HQ policy staff) will often be the contact points by which a lay impression of the liability risks is actually constructed (or reinforced) by the individual landowner.

These findings resonate with the (largely non-empirically based) viewpoints emerging in our consideration of the UK position within this report.

5.3.3 New Zealand

McDonald (2004) (a countryside access campaigner) presents a detailed critique of arguments raised in September 2004 by Farmers Federated of New Zealand (a farmers group) in opposition to proposed extension of countryside access rights in New Zealand. Whilst McDonald's commentary is unverified, it is detailed and considered in tone.

It appears to shed familiar light onto the perception of landowners (in this case farmers) of the spectre of landowner liability. McDonald notes that despite provisions introduced in the Occupational Health & Safety in Employment Amendment Act 1998 to explicitly reassure farmers that they would not be liable for non-work related injuries to recreational users, the theme of fear of liability continues as a key theme of farmers' opposition to further proposed access legislation. McDonald (2004, p32) quotes from Federated Farmers' 2003 submission to the New Zealand Government's Land Access Ministerial Reference Group:

"...Federated Farmers contends that in today's increasingly litigious society, it should not be unexpected that landowners will take a precautionary approach to exposing themselves to the risk of litigation: indeed it is a perfectly rational response...Federated Farmers agrees that a solution must be found to reducing landowner liabilities towards recreational users under health and safety legislation..."

This persisting call for "something to be done" to reduce the perceived high risk of landowner liability, even after such steps have already been taken, has an echo in Henderson's (2007) study of US rural landowners in the Mississippi Delta - who indicated that around 20% of them would have been prepared to consider making their land available for recreational access provided the risk of liability was reduced (yet, as previously mentioned, over 90% of the sample group were either mistaken or unsure about what the current liability regime actually was).

5.4 Fear of liability or fear of change?

The US studies and the anecdotal example from New Zealand, suggest that expressed anxieties about landowner liability risk may amplify at times where the landowner community is experiencing the threat of change to access regimes (and/or other uncertainties). This suggests that liability anxiety risk may be a proxy for other fears - perhaps deeper anxieties which it is less publicly acceptable to voice (for example a fundamental preference for keeping their land private).

The landowner liability risk theme can be found in contemporary UK discourse on access, for example NFU (2008), whose Vice President, commenting in response to the UK Government's Marine Bill (and its proposal for a new right to roam within a "statutory coastal access corridor" within England) includes the view:

"...We cannot have access on the cheap, especially with cliffs and tides an ever present danger. Farmers also need assurance that farmer liability is also addressed or the project's success could be jeopardised."

In a similar vein the Historic Houses Association in its response to the UK Government's consultation on the Marine Bill (HHA 2007) stated:

"It is essential that there is a workable liability regime which should remove liability for the occupier for non-natural as well as natural features, except in cases where the land manager has intentionally created a hazard." (p4)

Research undertaken by the University of Brighton for the Forestry Commission (Forestry Commission 2005), undertaken in the run up to the introduction of the "right to roam" legislation in England & Wales showed that landowners of woodlands in the south east of England were concerned about public liability and rising insurance premiums - and that they wanted more information on the implications of improved public access upon liability and insurance.

The theme can also be found in access position papers published during the 1990s by the Country Landowners' Association (1996) and National Farmers Union (1998) (HoC 1999).

From the private landowners' perspective (drawing on our literature review and our scoping study) the wider fear may often be a fear of the unknown - an innate caution when faced with (in their view) yet another different layer of access legislation. The concern can be "how will all of the law and liability fit together"? New legislation (and new policy initiatives) are "untried and untested" at the point of their creation - and the landowners fear the costs and other detriments that they may suffer through the trial and error process of implementation. There is a concern that clarification of what the law actually requires will only emerge through unfortunate landowners getting drawn into litigation.

A number of respondents queried what benefit access has for private landowners who are not engaged in visitor related businesses. Those without a financial incentive to attract access may, given a free choice between opening up their land to greater access or maintaining the status quo, may choose the latter - as a safer, rational course in an uncertain environment.

Landowners whose businesses are not concerned with the benefits (to them) of the presence of the public may see the prospect of increased public access to their land, or proximity to it, as a threat to their ability to continue their current operations. Each of the following are fictionalised scenarios of anxiety drawn from the researchers' and the respondents' experience:

- I don't want the public near my site because they damage my crops / litter / flytip / worry my livestock / steal equipment;
- I don't want the public near my site because they use it for dangerous or antisocial activities;

- I don't want the public near my site because the presence of local walkers counts as human receptors which will mean that I will have to reduce the atmospheric pollution emitted from my nearby exhaust vents; and
- I don't want the public near my site because I have soil contamination there - if the local authority finds out that people regularly pass near my site I will have to remove that contamination. But if no-one comes to this area then there is no justifiable grounds on which I can be required to remove this material.

Each of the above may be a rational perception of the disadvantages of allowing access from the perspective of the private landowner. Whilst the first two may be very familiar to the access community, it is unlikely that the last two will have been encountered before in public dialogue on access matters. However, privately, such considerations can be significant issues for industrial owners of open land sites (and their lawyers and technical advisers).

The following are a random selection of "liability" related case studies featured in a CLA submission (CLA 2007) in response to the UK Government's consultation on the Marine Bill and proposed coastal access to be introduced in England & Wales (these are not fictionalised):

- **holiday cottage business featuring steep cliffs.** Concern that improved safety borne of privatisation of this cliff face would be lost - there having been three deaths within 20 years prior to taking site over and rendering it private land and excluding access to fishermen and climbers;
- **owner of boathouse.** Fear of liability for persons who might break-in and hurt themselves;
- **coastal farmland.** Concerned about safety as people have been killed on the beach due to landslips;
- **oysterbed owner.** Fear of liability for tree surveys and exacerbation of local "dogging" problem;
- **coastal defence owner.** Concerned about further expense through recreational damage and liability for injuries to visitors;
- **coastal holiday park.** Fear of loss of control over who may enter the park, e.g. paedophiles;
- **coastal farm.** Concern about possible liability if visitors should encounter unexploded ordnance; and
- **golf course.** Concern about liability to passers by from stray golf balls.

This sample gives an illustration of the diversity of rural 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.

6. THE STAKEHOLDER SCOPING SURVEY - EVIDENCE OF BARRIERS?

6.1 The stakeholder scoping study

The telephone interviews conducted as part of this desk study reveal an anecdotal and impressionistic view of the extent to which landowner liability fears are currently impacting upon recreational access provision. Intentionally the survey group focused largely upon the community of large, access-remit, multi-site public agencies.

The survey group also focused towards the senior end of the management chain in each organisation, and notably there is a sizeable representation from access and health & safety managers: communities one would expect to be:

- knowledgeable about law and liability matters;
- distrustful of sensational media stories; and
- able from their roles to offer a broad perception of the influence of these issues upon their organisation.

These voices speak for themselves - there are limits to what can reliably be extrapolated from the small sample size. The interviewees also speak for themselves in the sense that they were encouraged to speak personally and candidly - and their views should not necessarily be taken as those of their employer.

We summarise below the reactions to each of the substantive questions put to the interviewees. The questions were:

- *"How significant is fear of safety litigation within your organisation?"*
- *"Where does this fear originate from? (internal / external?)"*
- *"How are decisions taken within your organisation about the level of public safety that needs to be provided?"*
- *"What effects on access provision has fear of safety litigation had on your organisation? (give examples)"*
- *"Are visitor accident claim rates on the increase? (in your organisation / in all organisations)"*
- *"What factors do you think influence whether the public will make a claim following an accident?"*
- *"Why do you think private landowners are reluctant to give access?"*

In the next Chapter we draw together, and compare, the findings of the literature review and the scoping study.

The following table (Fig 1) identifies the core attributes of our telephone sample group.

6.2 Key findings from the scoping study

6.2.1 *"How significant is fear of safety litigation within your organisation?"*

Many of the respondents challenged the use of the word "fear" in this question. They preferred to characterise visitor safety as an issue to be achieved, alongside other operational responsibilities. For most the awareness was of the importance of safety per se, only a minority considered that avoidance of safety litigation was a key shaping force to the management of their places and activities. This response was particularly characteristic of the senior health & safety managers and access managers in the sample group.

Some of the respondents acknowledged that an anxiety about potential liability (or more broadly adverse public relations impact) was an influence over some site-level managers. It was felt that this reflected their lesser familiarity with the realities of what the law actually requires and low visitor accident rates.

None of the organisations surveyed reported an embedded and recalcitrant collective risk adverse culture within any particular sector of their organisation. Risk aversion where encountered was an individual trait, signalling mis-perception of the actual risk posed. Where such anxieties arise they are responded to (if spotted) by the organisation's strategic health & safety (or sometimes) access managers and the local staff are reassured about the necessity and desirability of leaving an element of risk within the organisation's visitor access provision. It was reported that site level staff are most likely to exhibit anxieties when faced with unfamiliar proposed activities / initiatives. With reassurance and contextualisation of the actual risk levels staff will willingly alter their perception.

Few respondents referred specifically to legal concepts in outlining their understanding of liability risk (although a minority appeared quite sophisticated in their understanding). Most respondents alluded to civil liability as their interpretation of "liability risk". However respondents representing the experience of more regulated sectors, or those where there was direct organisational experience of safety related regulatory investigation or enforcement referred primarily to an anxiety about criminal liability. None of the (non-lawyer) respondents mentioned the Corporate Manslaughter and Corporate Homicide Act 2007.

One (large multi-site public agency with recreational access remit) illustrated graphically the chill effect that a regulatory investigation by the HSE can have upon the culture of safety management within an organisation. In response to an ongoing investigation by the HSE of a visitor fatality incident site (and attendant arrests of staff members) managers have become considerably more aware of their potential exposure to individual criminal liability.

Fig 1 - Scoping survey group composition

Name	Position	Organisation	Category	Attributes
Richard Brooks	Access & Recreation Officer	Defence Estates	Access	GB remit - military land - management of conflicting land uses
Rob Garner	Policy & Advice Officer, Recreation & Access	Scottish Natural Heritage	Access	Scotland - access law and policy
Paddy Harrop	Recreation & Public Affairs Manager	Forestry Commission	Access	England remit - forestry
Mike McClure	Countryside Recreation Development Officer	Sport Northern Ireland	Access	Northern Ireland remit - sport and recreation policy
Andy Maginnis	Acting Countryside Manager	Worcestershire County Council	Access	England (Midlands) - recreation policy and operational management - Local Government Association
Chris Marsh	Recreation Policy & Process Adviser	Environment Agency	Access	England & Wales - flood defence infrastructure - Visitor Safety in the Countryside Group
Richard Owen	Access Management Adviser	Countryside Council for Wales	Access	Wales - access law and policy - CRoW implementation
Anne Gray	Access Officer	Scottish Rural Property & Business Association	Access / Private Landowners	Scotland - rural landowner perspective

Name	Position	Organisation	Category	Attributes
Sue Hilder	Access Officer	National Farmers Union - Scotland	Access / Private Landowners	Scotland - farming perspective
Andrew Shirley	National Access Adviser	Country Land & Business Association	Access / Private Landowners	England - rural landowner perspective
Jason Rankin (by email)	UFU representative on NI Countryside Access & Recreation Network	Ulster Farmers' Union	Access / Private Landowners	Northern Ireland - farming perspective on access issues
John Corden	Head of Health, Safety and Resilience	Southern Water	Health & Safety	South Eastern England - reservoirs - National Water Safety Forum
Anne Gillan	Health & Safety Officer	National Trust Northern Ireland	Health & Safety	Northern Ireland - heritage landscape and risk management
Nikki Kemmery	Health & Safety Manager	Yorkshire Water plc	Health & Safety	Yorkshire, England - reservoirs - Water UK
Emily Ramsay	Health & Safety Officer	Forestry Commission	Health & Safety	GB remit - forestry
Peter Wade	Visitor Safety Manager	British Waterways	Health & Safety	GB remit - inland waterways
Alan Streater	Liability Underwriter	NFU Mutual	Insurer	Specialist agricultural insurance underwriter
Lukas Rootman	Senior Associate	Nabarro LLP (Solicitors)	Lawyers	England & Wales - health & safety litigation

Name	Position	Organisation	Category	Attributes
Graeme MacKenzie	Risk & Business Continuity Manager	Dundee City Council	Local Government	Eastern Scotland - municipal risk management - Association of Local Authority Risk Managers
Paul Osborne	Environmental Improvement Officer	Exeter City Council	Local Government	Ex Torbay Council Senior Urban Design and Landscape Officer
Roger Whitehouse	Head Park Warden	Hawkstone Park	Visitor attraction	Shropshire, England - heritage landscape and risk management
Andrew Upton	Director of Conservation	Ulster Wildlife Trust	Visitor attraction	Northern Ireland - conservation and access - nature reserves

6.2.2 "Where does this fear originate from? (internal / external?)"

There was a general perception amongst respondents that society in general has become more litigious and that members of the public may now be more minded to claim in situations of loss or injury (and/or to concoct spurious claims). However none of the respondents reported that their own organisation appeared to be suffering a notable escalation in criminal or civil litigation.

Many of the respondents were self-insured (i.e. do not hold public liability insurance policies) and therefore did not have relationships with liability insurers to take into account.

However, of those organisations which do carry public liability insurance cover, the role of insurers in relation to influencing a "fear" of safety litigation was not considered to be significant. Most respondents who expressed an opinion felt that the fairly small value of visitor safety related claims meant that all or most of the burden of these would be met by the organisation rather than its insurer. There was a correspondence between all respondents (including the insurance underwriter and local authority insurance manager) in a view that visitor safety claim rates are not a cause of concern for insurers - and therefore insurers are not seeking to intervene in access provision issues. One respondent suggested that occupational accident rates were considered to be much more significant in the setting of insurance premiums.

Many respondents pointed to sensational media reports as a source of misperception about liability risks but few seemed aware of the HSE's "myth busting" initiative. A number of respondents pointed to the fact that whilst sensational claims might be reported, the final outcome of these cases is rarely publicised. Were such outcomes to be publicised then the public (and fellow managers) would come to see that the vast majority of cases do not succeed - and that the law on visitor safety is pragmatic and stable. There was also frustration that these cases focus upon a small minority of "exceptional" cases, rather than depicting the (less colourful) reality of the majority of "average" cases and how they are actually dealt with by the courts.

A number of respondents stated that the risk of being reported in the media for "excessive health & safety" was considerably greater than being reported in the media in the event of an accident if a marginal risk was left unaddressed.

6.2.3 "How are decisions taken within your organisation about the level of public safety that needs to be provided?"

The majority of the respondents represented large multi-site public sector agencies in which a centralised and systems-driven approach to management was embedded. Accordingly it was no great surprise to find evidence of a pro-active, rational, evidence-based approach to risk assessment and management within those organisations, or that there was awareness of health & safety legislation and HSE guidance.

Decisions about the required level of safety provision in these organisations are taken as part of a considered, deliberative and documented process. A degree of cost-benefit calculation is evident (reflecting the balancing required within "public risk" between risk - access and sustainable expenditure).

Of particular note was the importance of peer networks in helping to form common understandings of what should be taken as "reasonable" level of safety. A number of formalised peer networks such as the Visitor Safety in the Countryside Group, the Water Safety Forum and the Tree Safety Group were identified. Such groupings appear to have had a particularly formative influence upon the "benchmarking" of safety standards - and to have contributed to a palpable sense of reassurance amongst the respondents. It was clear that on occasion such groupings have proved to be a valuable defence mechanism to their members faced with (in their view) over zealous enforcement action by local level regulators. In particular it was clear that the VSCG's "Managing Visitor Safety in the Countryside" guidance, via its Risk Control Matrix (VSCG 2005, p13), has been instrumental in encouraging these organisations to set different levels of safety provision (versus reliance upon visitor "personal responsibility") in accordance with the concept of a differential spectrum running in stepped stages of provision between the extremities of "urban" and "wild" terrain. This concept draws on approaches developed in North America, a model that Grove (2006) describes as the "Recreation Opportunity Spectrum".

In contrast to these structured and rational arrangements for safety standard setting amongst the respondents from large (and/or access remit) organisations the representatives of private landowners suggested that the perception of what the law requires is not shaped in the same way for their communities. Instead such organisations will rarely have visitor safety as their primary concern. They may have some experience of the complexity of occupational health & safety law and/or or enforcement action within that context. They will characteristically be smaller, owner-operated businesses, often with a single site operation (e.g. a farm). These respondents suggested that the world-view of such persons will be markedly different from the systematic public bodies. They will be characterised by a reactive approach to management of their affairs, not be document driven, locally focussed (possibly parochial in outlook), and innately suspicious of change and intrusion. Such organisations will struggle to "make sense" of what the law requires of them, and will be susceptible to the informal spread of myths and mis-perceptions about the risks entailed in offering (or being forced to provide) access to their land. Instead of drawing upon sector-wide standard forming (and defence) networks such landowners will build their picture of what is required by (in the words of one respondent) "conversations in the pub, stories in the media or chats with neighbours over the farm yard gate" or view the world purely through an agricultural focus, taking their news (and perhaps some of their views) from the small (fairly) closed circle of the farming press and its regular industry commentators.

6.2.4 "What effects on access provision has fear of safety litigation had on your organisation? (give examples)"

The respondents were able to point to few actual instances in which a fear of safety litigation has prompted a change to access provision.

One respondent mentioned a blanket prohibition upon swimming in its water bodies - even though it would have been happy to regard the risk level as tolerable for such access to be given to organised and responsible groups. However a blanket ban for all was maintained on the grounds that differential rules between classes of users would have sent a confusing message. However the concern here appeared to be more about effective risk communication than litigation avoidance.

One respondent stated the view that given the nature of countryside land, attempting to remove risk by withdrawing access would rarely be effective (fences or other boundary structures would soon be overcome).

Some respondents pointed to instances of over-zealous safety signage by local site managers - and many of these respondents pointed out that such instances of "rogue" signage would be challenged by them. There was a concern amongst the health & safety and access managers that allowing unnecessary signage to proliferate at local level would both spoil the recreational experience of the visitor and undermine the policy line that groups like the VCSG are seeking to maintain against the feared "ratcheting" of reasonable safety provision standards.

A couple of respondents pointed to the role of byelaws as a mechanism available to them to set (and enforce via fine and/or exclusion) visitor behaviour at their sites. This was described as a long process, but appropriate as a (visitor) standard setting technique. Clearly, few organisations will have direct access to such techniques.

6.2.5 "Are visitor accident claim rates on the increase? (in your organisation / in all organisations)"

None of the respondents reported a significant rise in visitor accident claim rates - indeed many respondents were able to recall only a few (<5) claims across their organisation during the last 5 years.

The two visitor attraction respondents each reported no claims.

In many instances the respondents were not themselves directly involved with claims management - but most formed their impression on the basis that their role in the organisation (i.e. as health & safety or access manager) would lead to such matters being drawn to their attention if visitor accident claims levels became of any significance to their claims managing colleagues or their insurers.

6.2.6 *"What factors do you think influence whether the public will make a claim following an accident?"*

This question asked the respondents to comment upon matters which they were not in all cases directly concerned with. However the most commonly identified factors were:

- **how the (potential) claimant was dealt with during and after the accident** - the implication being that someone who has a bad impression of how they were dealt with would be more likely to claim;
- **the seriousness of the injury sustained** - whilst most accidents sustained in the countryside would be of the minor, "slips and trips" variety - there was a general view that claims would be more likely in relation to serious injuries, particularly where the victim's livelihood had been affected; and
- **how the victim sees the world** - most respondents suggested that claim behaviour would be affected by an individual's personality and their world view. Those who are "rights minded" may be more likely to claim than someone with a strong resignation to "fate".

The following additional factors were also mentioned by some of the respondents:

- **differential expectations of safety** - here the suggestion was that some people may have a higher expectation for safety provision by landowners than others, and this may have a relationship to levels of familiarity with the countryside in general;
- **levels of claims consciousness** - opinion was mixed about which sections of the community might be expected to have the greatest levels of claims consciousness. Some suggested that highly educated people would better understand the redress available to them, whilst others suggested that claiming might be more prevalent amongst the poor, with "no win, no fee" as a driving force;
- **the identity of the landowner** - some respondents expressed the view that large public sector bodies and utility companies would be more likely to receive claims, as they will be perceived as "able to afford it" - but that people might be more reluctant to claim against smaller organisations; and
- **the blameworthiness of the accident** - only two respondents specifically mentioned factors of fault and causation. Here the suggestion was that a claim may be more likely if an injured person attributes his injury to a clear failing (e.g. lack of maintenance to a structure) by the landowner.

6.2.7 "Why do you think private landowners are reluctant to give access?"

The majority of the scoping survey sample group were large, pro-access landowners. A minority of bodies representing small and/or private landowners were included.

Accordingly, in responding to this question, most of the respondents were giving their perception of how others (i.e. private landowners) perceive the issue of landowner liability.

A variety of factors were suggested by various respondents:

- **Fear of liability** - most respondents considered that an anxiety about liability was a sincerely held belief, and one that could have a powerful effect on landowner attitudes to access;
- **Safety as an excuse for something else** - however many respondents felt that the language of safety was an acceptable way of voicing broader anxieties that might not be publicly palatable. In short, that anxiety about liability is a proxy for a fear of further extension of access legislation, the actual issue being a core resentment of statutory intrusion and control over their own land;
- **Fear of the unknown and uncontrollable** - the allusion here was to a general mindset (described earlier) that rural landowners, and particularly farmers, may have a different way of forming their understanding of access and liability issues - and that for them a fear of change and/or fear of the public could be very tangible, and influential over engagement with access issues;
- **Ignorance of the law** - a relative lack of sophistication in understanding principles of law and liability (and processes by which such understandings are constructed) could also significantly affect private landowners' perspectives. This ignorance may be present not just in the landowners themselves but also in the local intermediaries from who they receive their (formal and informal) advice (NB: in our experience interviewing the Access Officers of both NFU Scotland or SRPBA we found them to be very knowledgeable and practically focussed upon translating access and legal discourse for the illumination of their members);
- **Disruption of core business** - there are circumstances in which clear physical and practical detriment to the private landowners' primary use of his land. The loss of livestock (both as a monetary issue and an accident hazard) through gates not being closed and heavy pedestrian trafficking affecting crops or land rehabilitation being two examples that we were referred to by respondents;
- **Distance from the public risk consensus** - compared to the public agencies and utilities with recreational access as part of their policy remit, private landowners have no particular direct benefit to be reaped from

embracing a tolerable amount of risk. Therefore even a small perceived risk has no counterbalancing benefit or gain to offset it. Private landowners are likely to be particularly remote from the emerging public risk policy consensus. Their concept of risk management will be framed by their more direct experience of occupational safety (i.e. farmyard machinery) and will therefore frame safety as an absolute (because, as we have seen, occupational safety cases are far less forgiving of residual risk); and

- **Relative vulnerability to a single incident** - finally, a number of respondents pointed to the difference of perception between public sector managers who can view risk across a broad portfolio / community of users and who therefore express risk in terms of probability and the perception of risk by a private landowner who may have one site, in which the totality of his assets are invested. From this private landowner's perspective just one accident could suffice to wipe out his business. He may not be comforted by arguments of probability - particularly if he has some notion of the uncertainty of law and liability processes.

6.3 Did the study show any differences between England & Wales, Scotland and Northern Ireland?

The respondents were selected to give a spread across each of England, Wales, Scotland and Northern Ireland.

Divergence of perspective was found (non-statistically) to be more significant between the relative size of landowner / scale of access than in relation to any evident difference of liability or access regime between the four UK jurisdictions.

It was clear however that respondents in Scotland were particularly focussed upon working through the fundamental structural changes introduced by the Scottish land reform and "right of responsible access" legislation. It was clear speaking with Scottish respondents that widespread debate had been engaged in recent memory regarding both prospects for widening access and the potential for a detrimental effect on landowners in terms of a feared rise in landowner liability and/or insurance premiums.

The tone encountered for England & Wales was less pronounced - that the access rights now provided south of the border were of a less order of magnitude and fear-factor - but with signs that the issue was re-emerging given the current consultation on the Marine Bill's proposed new coastal access for England & Wales.

It was clear that Northern Ireland has the most active debate about occupiers' liability, particularly in the context of National Park consultations, and therefore it was no great surprise to detect that private landowners' stated anxieties about landowner liability were currently at their strongest in that jurisdiction. Drawing upon the US and New Zealand research summarised in an earlier chapter, and the recent experience of policy development in the other UK jurisdictions, it is not a surprise to see such anxieties currently emerging in Northern Ireland.

7. CONCLUSION AND RECOMMENDATIONS FOR FURTHER RESEARCH

7.1 Conclusions

The opinions and perceptions garnered through the scoping study in many respects support the findings developed in earlier Chapters from the literature review.

However, the scoping study does appear to indicate that public agencies and utilities with access remits do not appear to be suffering "fear" of landowner liability - and there is little evidence from the scoping study to substantiate the assertions made by commentators that a fear of liability is curbing the provision of access to *these* organisations' land (or otherwise affecting their approach to risk).

But there is some, indirectly reported, evidence that private landowners may be more susceptible to such fear, and that this may fundamentally spring from a different view of their land, the public and what the law requires. The fear would appear to be greatest in small farmers and industrial, highly regulated, industrial landowners. In part this perception may be formed by sensational media reports of extreme cases, and in part by a deep lack of understanding in society as a whole (outside professional health & safety and access managerial circles) about how the balance can be struck between safety and (beneficial) risk (i.e. matters of public risk). For the small farmer the public may appear an alien threat (with no corresponding benefit) whilst to the industrial landowner incursion by recreational visitors may be seen as a risk of regulatory censure or liability should "the public" be found to be exposed to the risks inherent in that land use.

It may be said that local authorities represent something of a "half way house" between these two polarities. Local authorities appear more vulnerable to a fear of litigation than centralised, access remit, national agencies. However local authorities appear more aware of safety management than smaller private landowners and more aware of their responsibilities to provide recreational facilities and services to the public. The diversity of local authority management structures however appear (following Gibbeson 2008) to construct differing levels of vulnerability to fear of landowner liability, and accordingly differing levels of risk adverse response to the perceived risks. We consider that investigations to build upon the type of work undertaken by Gibbeson (2008) would improve understanding of the factors that may prompt individual local authorities to adopt extreme readings of risk in relation to places or activities regarding by their peers as "reasonably safe".

In the next section we suggest further research which could seek to directly investigate the extent, nature and significance of private landowner liability fears - given that this scoping study was not able, directly, to investigate that community.

Our scoping study focussed primarily upon the perceptions and practices of large public sector bodies. The perceptions and practices of private sector landowners were dealt with indirectly, via enquiry of representative farming and rural business associations. With one exception, we did not directly investigate individual private landowners' perceptions. However our study found some indirect evidence to

suggest that, in contrast to our survey group, private landowners (who do not have an access-remit or a professional safety management culture and who have less direct experience of legal and public policy processes) may be considerably more vulnerable to an over-stated risk perception of landowner liability risk. We have offered views in this report on why a difference in risk perception might be present - but on current evidence we can neither prove, nor disprove, the existence of such a distinction in the UK. Given the absence of any pre-existing studies on this, we recommend that whether such a heightened risk-anxiety exists amongst private landowners (or distinct communities within that wide class) requires specific investigation. Such future analysis would also need to examine whether any heightened anxiety (if any) in such communities actually results in greater denial or withdrawal of recreational access to their land.

Understanding how these communities form and articulate their perceptions of liability risk is, we believe, crucial to determining how best to engage with and address any entrenched landowner liability anxieties. Impressive work has been done by a number of public agencies to produce lay guides aimed at reassuring private landowners that the access and liability regimes do not intend or threaten an increase in actual liability risk. Access advisory posts within key stakeholder bodies have also received public funding from bodies such as Scottish Natural Heritage with the aim of working within communities of private landowners to raise awareness of the real (low) level of landowner liability risk. However, to our knowledge, no studies have been carried out to establish the degree of penetration of such messages, how the communities themselves interpret those messages, and whether their view on landowner liability is accordingly altered by presentation of such guidance and assistance. Audience research may help inform future targeted campaigns, particularly if (as suggested by some of our respondents) expressed concerns about safety liabilities may actually be indicative of deeper anxieties, and framed in informal and local ways that are not readily accessible by written guidance or reassuring pronouncements of senior judges, academics, politicians and other public policy figures.

We also set out proposals for research into factors affecting why visitors do or don't claim compensation - should it be felt desirable to understand why visitor claim rates appear to remain consistently low.

Finally, we suggest that further research into the management of relevant claims, organisational responses to apparent trends in litigation law, and the culture of risk management within local authorities would address perceptions of difficulties in this area.

The Countryside Recreation Network agencies will wish to prioritise these various research studies following further discussion.

We also have specific recommendations concerning the detailed research design for each study, but this would more properly be explained through any future tendering process.

7.2 Design for further research - private landowners

7.2.1 Our recommended focus

We recommend that the attitudes of private landowners are investigated through a focussed qualitative programme of investigation. The emphasis should be upon quality rather than quantity: with an emphasis upon drilling "deep" into the attitudes of a selection of landowners (broadly stratified by type and location).

The investigation should enquire into the perception of landowner liability amongst private landowners, and specifically:

- Whether private landowners fear landowner liability;
- How they perceive visitors expectations of safety and "claims consciousness";
- What private landowners actually think and do in response to those views;
- Where they get those perceptions from; and
- How landowners respond when informed that the risk is less than they (may) think that it is.

An understanding of these factors could then inform future strategies for addressing anxieties and misperceptions of the risk in the wider community that the respondents represent.

7.2.2 Methodology

We recommend that the proposed methodology would involve a focus group method across both the national jurisdictions and relevant land management types.

Each focus group would be convened through collaboration with appropriate landowner / recreational interest groups. Ideally the focus groups would coincide with pre-arranged meetings of those groups (e.g. regional forums). This would maximise participation rates.

We appreciate that such co-operation from landowner interest groups cannot be taken as a given. There would be caution - and it would be important to explain that whilst the survey aims ultimately to adjust misperceptions of the risk of liability, the survey process would respect the sincerity and (for the respondent) rationality of their perception of these issues.

Collaboration would not be forthcoming if it is felt that the role of the survey is to come and preach to the respondents and show that them that their beliefs are wrong or "ignorant".

Through the different focus of each interest group, each focus group could also represent a particular theme focus (in addition to a geographical / topographical focus). For example - experience of recreational access generally, coastal access issues, perceptions of rural intermediaries (e.g. RICS), etc.

Each focus group would be run on the following semi-structured discussion basis and would seek to enquire into the:

- extent to which fear of liability is a significant factor influencing attitudes to access;
- what "picture" of law and liability the respondents have to support (or eliminate) that "fear";
- what perception they have of visitor's expectations of safety in the countryside and what factors influence visitors' decisions on whether or not to bring a claim in the event of an accident;
- where and how they have constructed that picture and perception; and
- how resistant to change of that picture and perception they are (and why).

7.2.3 Alternatives

An alternative approach would be to identify a geographically and orientation stratified sample of landowners and to contact each by postal questionnaire and/or telephone interview - asking structured questions about how they perceive liability risk.

However previous studies of farmers' attitudes (e.g. Forestry Commission 2005) have found very low response rates to postal questionnaires. We consider that due to the sensitivities that the target respondents appear to have about access related research the best prospects for a good response rate (and quality data) lies in working collaboratively within the interest groups and building rapport and reassurance of the sincerity of the researchers (and project sponsors) via "face to face" interaction.

We also favour a focus group approach given our hypothesis that expressed concerns about landowner liability may actually be a proxy for something that respondents may be less willing to articulate without the encouragement, probing and peer support of a kind created by a focus group environment.

7.3 Design for further research - why people do or don't claim

7.3.1 Is investigation of visitor's perceptions required?

Given that countryside visitor accident claim rates appear to be low and not rising - as reported by the scoping study, and as appears consistent with more general accident and claims statistics, we are unsure whether the project sponsors will

wish to undertake further investigation of visitor perception of safety and liability issues in countryside access.

However, to do so could be a valuable avenue of enquiry - as if it were the case that visitors have a low expectation of safety provision by the landowner (and a low likelihood of claiming) then this may provide further evidence by which the misperception of the risk of liability can be addressed.

7.3.2 The focus of the research

We consider that for consistency (and convenience) a similar investigation approach to that profiled above for private landowners could be used for visitors.

This would have as its focus understanding how visitors perceive law and liability in relation to visitor safety in the countryside. A focus group and/or face to face interview approach could be employed as explained above.

7.3.3 Methodology

We would recommend targeting visitors to a variety of countryside locations and inviting them to participate by direct approach. To enhance the cross-comparison effect between landowners and visitors we would recommend that the visitor respondents are interviewed at locations within the geographical territory of the landowner focus groups.

We would recommend that one visitor focus group or six individual interviews are conducted at each location with an attempt (but appropriate to the small sample size and the nature of usage at each local) to get a broad socio-economic coverage from the selection of the respondents.

A postal questionnaire is an alternative option - but we believe this would lack the dynamic insights that face to face interview contact using the "four cases" technique would enable. Also direct comparison between the landowner and visitor studies would not then be possible.

7.4 Design for further research - public sector

7.4.1 Our recommended focus

We recommend that the attitudes of local authority, NGO and public agencies open land and recreation managers are investigated through a focussed qualitative programme of investigation. The emphasis should again be upon quality rather than quantity: with an emphasis upon drilling "deep" into the attitudes of a small number of local authority "teams" through a case study approach.

The research would explore two avenues of inquiry.

First, through selected case studies, the research would seek to identify current trends in claims, and the approach of each selected organisation to the handling and management of claims (for example - who takes responsibility for claims

management, where does the decision-making power reside concerning procedures, how many claims are 'settled out of court', etc.).

Secondly, the investigation should enquire into the perception of landowner liability amongst "front line" open land managers and recreation officers and specifically:

- Whether private landowners fear landowner liability;
- How they perceive visitors expectations of safety and "claims consciousness";
- What they actually think and do in response to those views;
- Where they get those perceptions from; and
- How they respond when informed that the risk is less than they (may) think that it is.

An understanding of these factors could then inform future strategies for addressing anxieties and misperceptions of the risk in the wider community that the respondents represent.

This study should specifically seek to investigate the factors that influence anxiety levels within certain individuals and their organisations about landowner liability.

7.4.2 Methodology

We recommend that the approach taken to identifying and investigating these respondents should be more flexible than that proposed for the private landowner and visitor investigations. We hope that we have shown within this report that taking time to "dig" behind the headlines uncovers more prosaic processes by which decisions are in fact taken about matters of safety, access and liability management.

Accordingly this part of the future study should identify, and then "dig" into, six reported stories of local authorities acting in a risk adverse manner in relation to an access or similar safety related theme. The Swansea monkey puzzle tree report would be an example of the type of story to be targeted.

This approach may sound abstract - but it is actually an eminently practical and pragmatic methodology. It reflects the standard event-investigation process of inquiry which an investigative journalist, regulator or lawyer would employ in order to build an understanding of how a number of people, each by their own individual action or thought, collectively contributed to an event occurring.

The challenge with this method is not its (by one view) abstract nature in seeking to map layers and interactions of meaning within an organisation, but rather the natural aversion that a "grass roots" council officer might have about discussing his perception and judgements with an outsider.

We consider this to be a challenge which can be managed by working with the Local Government Association and the Countryside Management Association.

7.4.3 Alternatives

An alternative approach would be to identify a geographically and orientation stratified sample of land managers and recreation officers and to contact each by postal questionnaire and/or telephone interview - asking structured questions about how they perceive liability risk.

However we consider that this would fail to give the in depth insight that a case-study approach would entail.

7.5 Follow up research

Given the large number of stakeholder bodies that have a perspective upon access and liability issues it is likely that the findings of the field research (and the passage of time) will require that some primary policy and legal sources will need to be reviewed as part of the analysis of the private landowner survey work. In particular, direct review of consultation responses on access issues by bodies representing private rural landowners is recommended.

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