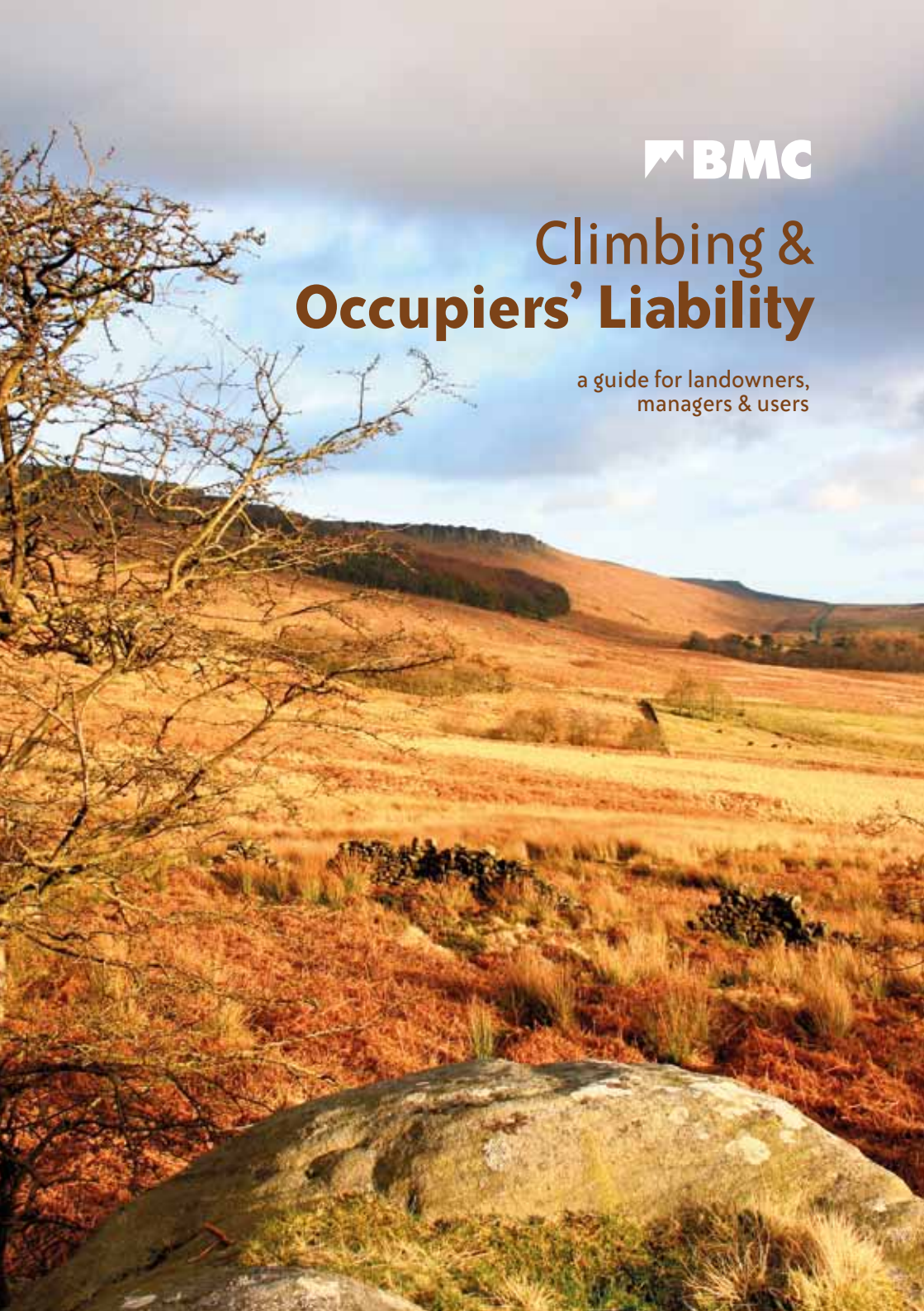

BMC

Climbing & **Occupiers' Liability**

a guide for landowners, managers & users

Climbing & Occupiers' Liability

Introduction

The British Mountaineering Council (BMC) has published this leaflet for the benefit of all owners and occupiers of land used by climbers on which there are cliffs, crags, quarries or outcrops which might be suitable for rock climbing. This guidance applies to England and Wales and explains in brief existing legislation which affects the obligation of landowners and occupiers, and the real rather than perceived risks associated with rock climbing, to help address landowners' concerns.

Some owners and occupiers have traditionally been happy to give access for rock climbing but others are doubtful whether they should because of perceived concerns over possible legal liabilities.

The BMC is confident that landowners or occupiers will not be exposed to any potential liabilities in the event of an accident occurring to a recreational rock climber on their land. The situation regarding formally organised groups under instruction and commercial activity may be different (*see section on **Organised Groups***). Climbing is an adventure sport and the courts generally apply the principle that voluntary acceptance of risks by participants prevents a claim against others who have not committed any culpable act.

If a climber is injured in an accident any claim against the owner or occupier should be defeated by the defence that the injured person willingly accepted the risks (the *Volenti non fit injuria* principle).

Climbers, walkers and mountaineers have traditionally accepted that they are, as individuals, responsible for assessing and managing any inherent risks that are ordinarily part of the activity. These include such things as loose rock, rockfalls and the suitability or otherwise of any equipment (whether fixed or not). Indeed, this is part of the challenge of climbing. There is no expectation in a climber's mind that an occupier or owner would be expected to be responsible or liable for such risks, or for the safety of climbers on the land. The BMC's Participation Statement sets this out clearly and applies to all climbers, walkers and mountaineers.

The BMC recognises that climbing, hill walking and mountaineering are activities with a 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.

If a climber is injured in an accident, any claim against the owner or occupier should be defeated by the defence that the injured person accepted the risks. However, one difficulty in explaining occupiers' liability is that every situation is different. This guidance gives general advice to the climber and owner or occupier, summarising the key pieces of legislation affecting liability. Definitions used throughout this leaflet are summarised on the back page.

A guide to Occupiers' Liability

Key pieces of legislation are the Occupiers' Liability Act 1957 (the 1957 Act) and the Occupiers' Liability Act 1984 (the 1984 Act). Further changes were made in the Countryside and Rights of Way Act 2000 (CROW) (section 13) and in the Marine and Coastal Access Act 2009 (MCAA) (section 306).

The 1957 Act applies to visitors to land, whilst the 1984 Act applies to trespassers. CROW and MCAA apply to persons on open access land and the coastal margin respectively.

These Acts (or sections of these Acts) deal with possible civil liability, not criminal liability. This means that an occupier cannot be prosecuted under these Acts, but can be sued in the civil courts by an injured party under certain circumstances. However, the BMC is not aware of any successful claims by rock climbers in England and Wales. There have been cases when occupiers have been successfully sued for failing to give notice of a hidden hazard which was known to (or should have been known to) the occupier. Examples are a shaft within an unfenced area, accessible to the general public, and trees in a dangerous condition on land visited by the public.

What is the Occupiers' duty of care?

Occupiers owe a 'duty of care' to anyone who might be on their land or premises. The extent of this duty varies.

(i) Duty of care to visitors

The 1957 Act provides that occupiers of premises owe a 'common duty of care' to all visitors who come onto land by invitation of the occupier or who are permitted to be there. The duty is to take care over the state of the premises so that visitors will be reasonably safe in using it for the intended or permitted purposes. Under Section 2(2) of the 1957 Act, the duty is "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there".

The 1957 Act provides that this duty does not impose any obligation on an owner or occupier to a visitor who willingly accepts risks.

However, there could be an obligation on the occupier to warn of any concealed hazards or dangers not evident to visitors but which the occupier knows about.

(ii) Duty of care to people other than visitors (including trespassers)

The 1984 Act extends the duty of care to people other than visitors, including trespassers, but only where three conditions are met:

- the owner or occupier knows, or ought to know, of the danger on his or her premises; and
- he or she knows or suspects that people might come near that danger; and
- the risk is one against which he or she might reasonably be expected to offer some protection.

Again, the duty of care does not apply to a person who willingly accepts an obvious risk. In addition, an owner or occupier may discharge the duty by warning of the danger and discouraging people from taking risks. In some cases actions such as the erection of fencing may be appropriate. This is especially important for risks that are known about but which might not be obvious.

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(iii) Duty of care to people on open access land (CROW section 13)

Across England and Wales, 1.25 million hectares have been mapped as open access land. This gives the right of access on foot to areas of mountain, moor, heath, down and common land for the purpose of open air recreation including climbing. People have a right to climb on crags on this land, except when any permitted seasonal or special restrictions are in place that prevent it. Those exercising their rights under the CROW Act can be expected to take primary responsibility for their own safety.

In order to avoid over-burdening the occupier of open access land, CROW states that people using open access land are not visitors. This means that the higher duty of care under the 1957 Act does not apply at all towards people exercising their rights on such land.

The lower duty of care to people other than visitors, under the 1984 Act, is further restricted on open access land so that the occupier's liability is limited to risks/injuries arising from things created by man and not to natural features. By virtue of section 13 of CROW, an occupier of land owes no duty to any person lawfully exercising his/her access rights with respect to risks arising from:

- "any natural feature of the landscape (including natural crags and cliffs), or any river, stream, ditch or pond, whether natural or not; or
- people passing over, under or through any wall, fence or gate, except by proper use of the gate or a stile."

Consequently, the occupier cannot be found liable for any damage or injury from such hazards by people taking access under CROW. However, the occupier will remain liable for injury arising from an accident caused by, for example, defective structures situated on access land or for any deliberate or reckless act or omission which he/she makes.

Even if an occupier were found to have a duty of care to a user of open access land and so potentially be liable, a court, in deciding whether he/she had taken reasonable steps to meet the duty of care, is required to have particular regard to:

(a) the principle that CROW access rights ought not to place an undue burden (whether financial or otherwise) on the occupier;

(b) the importance of maintaining the character of the countryside, including features of historic, traditional or archaeological interest; and

(c) any relevant guidance given by Natural England/Countryside Council for Wales (CCW) under CROW (section 20).

These arrangements apply only while CROW access rights are in force. They do not apply, for example:

- while the CROW access rights are excluded; or
- on land where CROW access rights do not apply at all – even if it has open access under other rights or arrangements; or
- to someone exceeding their CROW access rights.

It is possible to have land voluntarily dedicated as open access land (CROW section 16). The occupier of dedicated land also benefits from the reductions in occupiers' liability applicable to open access land.

(iv) Duty of care to visitors on coastal margin (MCAA section 306)

The MCAA also clarifies the occupiers' liability further, in this case along the coastal margin in England. The reduction of the occupiers' duty of care towards people on the coastal margin, under the 1984 Act, is greater than on CROW open access land, in that an occupier of such land owes no duty to any person for any injury caused by;

- "a risk resulting from the existence of any physical feature (whether of the landscape or otherwise)"

and so cannot be found liable for injury occasioned by it. The key difference is that occupiers of coastal margin are excluded from liability arising from all physical features and not just 'natural' features of the landscape.

It will be for visitors to coastal areas to keep themselves, and others in their care, safe within a potentially dangerous environment.

In Wales, access to the coast is provided in a different way. The Coastal Access Improvement Programme (CAIP) aims to improve existing rights of way and to develop new routes to establish a continuous Wales Coast Path; there is currently no wider coastal margin.

(v) Contracting out of the duty of care

The Unfair Contract Terms Act 1977 renders unenforceable any attempt to exclude or restrict an owner's or occupier's liability for death or personal injury sustained by a visitor to business premises. However, liability may be restricted where access is obtained for recreational or educational purposes which are not part of the owner's or occupier's business.

Where an owner or occupier charges for access he or she will be considered to be running a business. Any clause trying to absolve the occupier of liability will, therefore, not be effective. Nor can liability be excluded where there is an express contract to enter the land. However, the principle of *'risk willingly accepted'* should apply in the case of a climber who, having paid an entrance fee, readily accepts the risk associated with climbing. The BMC would advise any landowner charging for access to make it explicit in their terms of entry that this principle applies.

Other relevant acts

(i) The Mines and Quarries Acts 1954 (c.70) (section 151) and Quarry Regulations 1999

The Mines and Quarries Act 1954 has now been repealed apart from s151, which applies to abandoned mines and quarries. S151 was retained mainly to secure the health and safety of members of the public where these abandoned mineral workings are publicly accessible (i.e. they are in a 'place of public resort' [which includes open access land] or in the proximity of a highway [which includes public rights of way]).

Health and safety matters at active quarries are covered by the Quarry Regulations 1999. Under CROW, land that has been used for quarrying is excepted land and so the public would have no right of access to it under CROW. *Note: the Quarry Regulations define an active quarry as one which has been worked within the last 12 months.*

A quarry, whether it is being worked or not, could be deemed by the local authority to be a statutory nuisance because of its accessible nature to the public. If this were the case, it would have to be provided with an "efficient and properly maintained barrier to prevent persons accidentally falling into it". Similarly, the entrance or shaft to an abandoned mine, deemed to be a statutory nuisance, would have to be efficiently closed off and the closure properly maintained.

These duties of owners of mines and quarries are duties to the public and are designed to prevent accidents; they do not affect the common law principle that applies to climbers and walkers (whether as visitors, as users of open access land/coastal margin or as trespassers) – that, because climbers accept the risks inherent in their activity, the occupier is unlikely to be liable for injuries arising from these activities.

(ii) Health and Safety at Work etc. Act 1974 (HSWA)
This Act protects employees and other persons from risks caused by an employer's or self-employed person's business activity. A breach of the HSWA is a criminal offence, with prosecutions brought by the HSE and is subject to a higher standard of proof of guilt than under civil law (e.g. under the Occupiers' Liability Acts). HSWA is what is called an enabling act – it creates the power for more specific secondary legislation (regulations) to be brought in. The 'Management of Health and Safety At Work' Regulations 1999 are particularly relevant. Amongst other things, these require all employers and self-employed people to complete a suitable and sufficient risk assessment. The assessment should consider risks to public health and safety arising from the business's operations, and how the risks should be managed.

(iii) Liability under the Animals Act 1971
If an animal injures someone or causes damage, an occupier may be liable if;

- it was likely to cause that kind of injury or damage unless restrained; or
- any injury or damage it caused was likely to be severe; and
- the characteristics of the animal that made this likely are abnormal in that species, or are abnormal in the species except at particular times or in particular circumstances; and
- those characteristics were known to you, or to someone who looks after the animal for you.

An occupier does not have to be negligent to be liable under this Act but there is no liability if the damage or injury was wholly the fault of the person suffering it.

Organised groups

If the occupier gives permission for a supervised group to use a crag (which he or she may do if there was no public right of access), then all the group members including any instructor or guide are visitors, and so the duty of care would be as set out in the 1957 Act. The occupier should therefore make sure that visitors are aware of hazards present on the premises that may not be obvious, particularly in areas where the landowner could be reasonably expected to be aware of the dangers. However, the liabilities associated with rock climbing are unlikely to rest with the occupier, even if children are involved; they are likely to rest with the supervisor or instructor (see Section 2 (3) (a) of the Occupiers' Liability Act, 1957, which states "an occupier may expect that a person, in the exercise of their calling, will appreciate and guard against any special risks ordinarily incident to it…").

The duty of care to legitimate users of open access land is subject to the 1984 Act's provisions together with the restrictions in the duty of care set out in CROW section 13. In the case of duty of care to a climbing group using open access land, then the group is unlikely to have asked permission for access. If the group were climbing on a natural crag, the occupier would owe no duty of care to the group's members at all; however, if the feature was man-made (such as an abandoned quarry), then a duty of care may be owed. Climbers willingly accept the risks of their participation in a 'dangerous' activity and the BMC believes that occupiers have a substantial defence against claims arising from the activity. This would apply if the group was on land where restrictions were in place. If the abandoned quarry was included in the coastal margin under the MCAA, then there would be no duty of care owed in respect of an abandoned quarry (it being a physical feature).

Occupiers should be secure from liabilities arising from climbing activity by organised groups on their land on this basis.

Access management

Simple access management techniques can be used to reduce the likelihood of an accident occurring (*see, for example,* ***Natural England's Land Managers' Guidance Pack*** *for further information*). Restrictions to open access can be applied for where this is necessary for a short time in order to guard against any potential dangers. The 'Relevant Authorities' (Natural England, CCW, National Park Authorities and Forestry Commission) can also introduce restrictions to manage the risks to public health and safety on open access land.

The BMC's area representatives can also help with this. The BMC has access arrangements with landowners which are then publicised through the BMC's website and Regional Access Database (RAD). The climbing community has a good track record in following reasonable guidance where this secures access to crags and cliffs.

Conclusion

Overall, we consider that owners and occupiers of land should not fear that they will be the subject of litigation by climbers whom they allow onto their land and who then have an accident. The fact that climbers voluntarily accept the risks of their activity means that the principle of '*willingly accepted risk*' will protect owners and occupiers in all normal cases.

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Definitions

Below are definitions of several terms which are used throughout this leaflet, drawn from relevant legislation and common law.

Owner: a person who legally owns land.

Occupier: a person who controls land or building(s). On private land the occupier will normally be the owner or tenant. On common land (historical land which has remained largely untouched and which is subject to the rights of other people to graze animals etc), there may be multiple occupiers.

Premises: includes land and any fixed or moveable structures on it.

Visitor: a person who visits a place by invitation or by right.

Trespasser: a person who enters onto land without permission, invitation or right.

Exercising the statutory right of access: persons making use of the statutory right of access under the Countryside and Rights of Way Act 2000 (CROW) or under the Marine and Coastal Access Act 2009 (MCAA).

Open Access Land: Land mapped as such under the Countryside and Rights of Way Act 2000 (CROW). This includes areas of mountain, moor, heath, down and registered common land, and land dedicated under s16 of CROW.

Coastal Margin: Land mapped as such under the Marine and Coastal Access Act 2009 (MCAA). This includes the establishment of a continuous footpath along England's coastline and a permanent right of access to a coastal margin around the coast. In Wales, the Coastal Access Improvement Programme (CAIP) aims to improve existing coastal rights of way and to develop new routes to establish a continuous Wales Coast Path.

Rights of Way: A highway which gives the public a right to cross and re-cross any land, including privately owned land (on foot, horse, cycle or other vehicle depending on the Way's status). The use of a public right of way may be temporarily or permanently restricted by a Traffic Regulation Order issued by a Highway Authority or a National Park Authority.

Volenti non fit injuria: The legal principle that if someone willingly and knowingly places themselves in a position where harm might result, they will not be able to bring a claim against another party if suffering injury as a result.

For information on specific liability claims, please visit the ***Visitor Safety in the Countryside Group*** website at **www.vscg.co.uk**

Further advice is available from:
The Access and Conservation Officers
British Mountaineering Council
177–179 Burton Road
Manchester M20 2BB
T: **0161 445 6111**

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