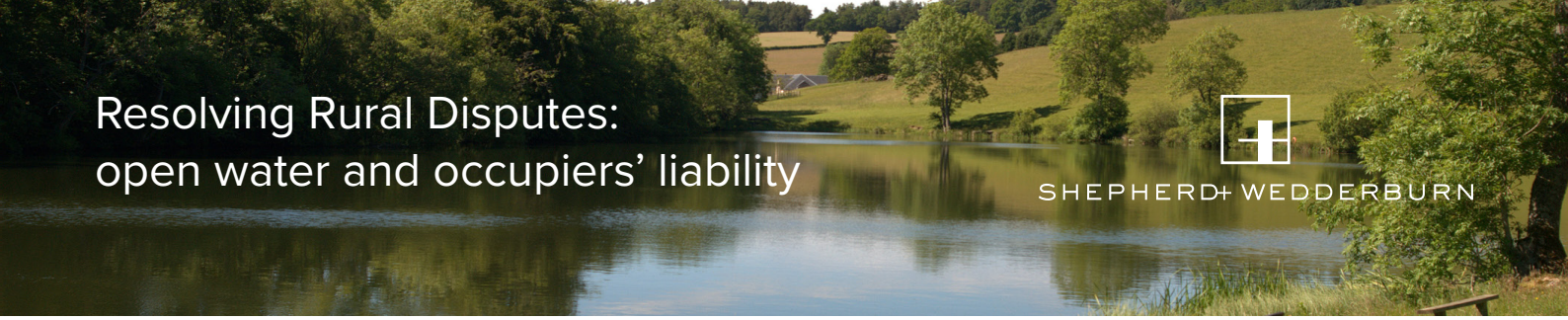

Resolving Rural Disputes: open water and occupiers' liability

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As wild swimming continues to enjoy a surge in popularity, **Stephanie Hepburn**, Senior Associate in Shepherd and Wedderburn's rural disputes team, looks at the duties owed by land owners and occupiers to members of the public accessing their open water on their land.

With more people than ever participating in open water, or wild, swimming, careful thought has to be given as to any duties owed by owners or occupiers towards those using water on their land for open water swimming, and we will consider these duties in this short article.

Under the Occupiers Liability (Scotland) Act 1960, those occupying land owe a duty of care towards people coming on to that land. The occupier is the person having control of the land – this will often be the landowner, but it may be the tenant or a contractor. The level of the duty owed is the level which it is reasonable to foresee will be needed so that people do not suffer injury or damage, and what is reasonable depends on the circumstances of each case.

Occupiers of land posing a greater-than-usual risk to third parties need to take extra care, and this often includes rural land which is subject to the right to roam provisions in the Land Reform (Scotland) Act 2003. The case of *Craig Anderson v John Imrie and Antoinette Imrie* in 2007 reinforced this.

Mr and Mrs Imrie were sued for breach of their duty of care as occupiers of their farm when a young boy was seriously injured on the property after being crushed by a heavy gate. Mrs Imrie was found to be in *loco parentis*; she was aware that the farm was a dangerous place for children and she should have foreseen that the boy could get injured if he interfered in some way with the gate and was not adequately supervised. Mrs Imrie was found to have failed her duty of care. You can access our full article on the case by clicking here.

This case highlights how important it is in the rural sector generally to take steps to keep property or land adequately secured, maintained and repaired. Measures that can be taken may include putting relevant warnings or protections in place, carrying out risk assessments and checking the condition of fences and gates, ensuring where possible that gates are secured in a way that means they cannot be opened by animals or children.

Any duty on occupiers does not apply to dangers inherent in the ordinary, familiar features of the landscape, whether these are natural or man-made. In the countryside, there are physical features that may be injurious to careless people or to young children against which it is impossible to guard by protective measures, and an occupier is not expected to take proactive steps in relation to every possible risk. For example, in a 2007 case, the court found there to be no liability where an occupier failed to erect a fence between a bench and a cliff top.

In *Graham v East of Scotland Water,* the court held that the occupier of a reservoir that was separated from a main road by a wall as low as 30cm at some points did not have a duty to fence it off, even though the wall was easily low enough for somebody to jump off or trip over. The reservoir and the wall were "*well established, permanent and familiar features*" of the landscape, even though they were man-made.

In contrast, in *Cowan v Hopetoun House Presevation Trust*, a ha-ha was distinguished from other natural features such as riverbanks or cliffs due to it being an unusual and concealed feature that someone crossing the land would likely be unaware of, and a duty of care was found to exist in respect of those walking in the vicinity of the ha-ha.

The key message is that every case is different and we would recommend seeking legal advice if you are unsure as to the duty that may apply in your specific circumstances.

Occupiers' liability and open water swimming

Occupiers' liability provisions apply to those invited onto the land to swim, such as those who are participating in organised sporting events like triathlons. The duty of care may also extend to open water, or wild, swimmers, but an occupier is not normally expected to guard against dangers which are obvious. In the English case of *Tomlinson v Congleton* in 2004, a young man broke his neck when diving into a lake. The lake was in a country park, and swimming in the lake was not permitted and there were signs up stating this. The House of Lords did not find the landowner liable, reaffirming the principle that there was no duty to warn or take steps to prevent the claimant from diving as the dangers were perfectly obvious.

The difficulty is in establishing whether a body of water is an obvious risk. The Scottish Outdoor Access Code suggests that responsible behaviour by land managers includes indicating where people can best take access to a river or loch to help minimise any problems. Risk assessments and seeking appropriate advice as to what obligations may be owed by the landowner/occupier is crucial.

Section 2(3) of the 1960 Act explicitly excludes any obligation on an occupier over risks willingly accepted by the visitor. This may apply to risks that may be inherent in pursuits such as wild swimming, and to more risky activities like rock climbing, where, depending on the circumstances, the access taker may be taken to have accepted the risk of injury if they have an accident.

While an individual may be allowed to engage in activities such as open water swimming at their own risk, and enjoy the pleasures of the countryside, the prudent course of action by a landowner or occupier is to act responsibly and, no matter the risk, ensure clear and understandable signage and if necessary, barriers, are in place.

For more information on this or a related matter, or to receive tailored advice, please get in touch with Stephanie Hepburn in our rural disputes team at stephanie.hepburn@shepwedd.com, or with your usual Shepherd and Wedderburn contact.

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