The Authority of Case Law

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Introduction

The ScotWays publication *Rights of Way: The Authority of Case Law*, edited by Alistair Lawson and written with the help of the ScotWays Legal Committee, was first published in 1998. Most of the cases it included were in relation to rights of way and over the years these have been supplemented by cases relating to access rights under Part 1 of the Land Reform (Scotland) Act 2003, and other relevant areas of law. The publication was a companion to *Access Rights and Rights of Way: A Guide to the Law in Scotland*, also published by ScotWays and this version is a companion to the current *ScotWays Guide to The Law of Access to Land in Scotland*.

This resource is intended for all those interested in outdoor access or involved in advising access takers and land managers. It is hoped that the summaries will give readers who are non-lawyers an improved understanding of the issues, and give them more confidence when discussing these issues with their legal advisers. Lawyers and law students will also find it a useful starting point for researching this field of law.

This resource provides summaries of court decisions in various fields that have a bearing on outdoor access: access rights, public rights of way, private rights of way (servitudes), liability, and navigation and foreshore rights. Cases relating to access rights and responsibilities under Part I of the Land Reform (Scotland) Act 2003 will be of particular interest. This Part of the Act is written in open terms and, during its evolution, Parliament recognised that the Courts would have a role in clarifying how it would operate. The largest number of cases concern rights of way. There have been numerous court cases, some dating back to the eighteenth century, and many aroused heated public debate in their time. Private servitude rights of way are included where the principles involved are similar to those in public right of way cases.

Liability cases (the liability of occupiers, and the liability of one access taker to another) have been included because this topic is of increasing interest to land managers and to those taking access. Cases on navigation rights and rights on the foreshore have also been included in order to complete the main areas of law relating to outdoor access.

The Scottish Court Service (SCS) Website has a searchable database of court decisions since 1998. Links to the appropriate full decisions on the SCS website are given where they are available.

Also referenced are some relevant decisions of courts in England and elsewhere. Scottish cases often refer to decisions in other jurisdictions where these are relevant.

The cases referenced here have been divided into five main areas. These can be easily seen in the main Court Case Category. Sub-categories can be found using the tags attached to each case and by using Ken's search bar at the top of the page.

Cases under the Land Reform (Scotland) Act 2003.

The court cases that have been brought under this Act have been important in providing guidance on the interpretation of the Act, which came into force on 9 February 2005. The Act gave everyone a right of access to most land and inland water in Scotland for recreation and other purposes, subject to certain exceptions, including allowing for an area of privacy around dwelling houses. A person only has access rights if they are exercised ‘responsibly’ in accordance with the Scottish Outdoor Access Code, drawn up by NatureScot and approved by the Scottish Parliament.

Cases have so far been initiated under two different sections of the Act. Under section 14, a landowner can appeal to the Sheriff Court against a notice that the local authority has served on him in respect of an alleged obstruction of access rights. Under section 28, anyone may apply to the Sheriff Court for a court order in relation to: whether access rights apply on particular land; or whether particular land managers or users have acted responsibly in relation to access; or whether there is a public right of way.

In view of the importance of the cases, most have been summarised in greater detail than cases in other parts of this publication.

Public rights of way and private servitude rights of way.

Cases involving rights of way continue to come to the courts even after the passing of the Land Reform (Scotland) Act 2003. These cases examine the principles in relation to both public rights of way and private servitude rights of way.

Many of the cases refer to the conditions necessary for establishing a public right of way. In brief, these are as follows:

1. the route must run from one public place to another public place;
2. the route must follow a more or less defined line;

3. the route must have been used openly and peaceably by members of the public otherwise than with the permission, express or implied, of the landowner; and
4. it must have been so used without substantial and effective interruption for a period of 20 years or more.

The law is examined in detail in the ScotWays publication: The ScotWays Guide to the Law of Access to Land in Scotland

Cases in Ken cover the following areas:

Relationship of public rights of way with private servitude rights of way and with ‘roads’ under the Roads (Scotland) Act 1984

Relationship of Public rights of way and private servitude rights of way

Except in unusual cases where there is an express grant by the landowner, public rights of way are established by prescription when they meet the conditions set out above. Private servitude rights of way are very often set out in title deeds, but can also be gained by prescription. However, different conditions apply: for example, there is no requirement that they should go from one public place to another.

Public rights of way and ‘roads’ under the Roads (Scotland) Act 1984

Public rights of way are ‘roads’ for the purposes of the Roads (Scotland) Act 1984. The Hamilton case below provides a useful analysis of the definition of a road and a ‘public right of passage’ for the purposes of the Act.

Creation of public rights of way – need for public place end points

A public right of way can only exist if it runs between two public places. What is a ‘public place’ for this purpose is one of the most difficult issues in rights of way cases. Lord Moncrieff’s statement in Marquis of Bute v McKirdy & McMillan is frequently quoted:

> “a public place is one to which the public have right of access, which the public have right to occupy and which in fact the public do occupy by a practice of resort”
>
> *Lord Moncrieff*

Creation of public rights of way – use as of right by the public for the prescriptive period

Creation of rights of way – interruption of the prescriptive period

Need for a particular line for public rights of way

Different kinds of use of rights of way

Rights of way – land owned by statutory undertakers or the Crown.

Public and private rights of way – ancillary rights and burdens

Obstruction of rights of way

Procedural issues

Navigation rights and rights in relation to the foreshore.

This Part covers cases concerning navigation rights and rights in relation to the foreshore.

In 2003 The Scottish Law Commission published a report (Report on Law on the Foreshore and Seabed) in which they recommended that public rights that are exercisable on the foreshore, sea, seabed and inland waters should be placed on a proper statutory footing, and enforced by local authorities. The Commission recognised that some of the existing rights (e.g. the right of recreation on the foreshore) are equivalent to access rights under the Land Reform (Scotland) Act 2003. They said that this caused confusion and therefore that the public rights that existed before the 2003 Act should be abolished insofar as they duplicated rights under the 2003 Act. However, no action has been taken, to date, to implement these recommendations. The Report and previous discussion paper both provide valuable background to this subject.

Cases in Ken cover the following areas:

Navigation rights

Position at common law

There is a presumption in law that there is a right of public navigation on tidal waters, including the sea, sea lochs, tidal rivers, and the foreshore of the sea and tidal rivers. The right of navigation is primarily a right of passage, but there are also rights that are incidental to the right of navigation. In tidal waters, these incidental rights include making use of the foreshore for beaching craft, loading or unloading goods, and drying nets.

Rights of navigation on non-tidal inland waterways – rivers and lochs – can be created by prescription, in a similar way to rights of way on land. However, there are some differences in the legal conditions required for establishing rights of navigation. Rights of navigation take twice as long (40 years) to establish; they cannot be lost for lack of use and can only be extinguished by Acts of Parliament; and there is no requirement to have ‘public place’ end points. A right of navigation can only be established on rivers or lochs which are physically navigable, so there can be no right of navigation where craft have to be removed from the water for portages. Once established, a right of navigation on a river is for travel in either direction. In cases where navigation rights apply on non-tidal waters, incidental rights are more restricted than in the case of tidal waters. This is because there is no foreshore and the banks are likely to be in private ownership.

Rights under Part 1 of the Land Reform (Scotland) Act 2003

The 2003 Act now provides a right of access on all inland water for non-motorised craft, subject to exclusions in the Act and provided that the rights are exercised responsibly in accordance with the Scottish Outdoor Access Code. However, rights of navigation continue to be important, particularly for motorised boats.

Rights in relation to the foreshore

The foreshore is the part of the shore of the sea and tidal rivers and lochs between the high and low watermarks of spring tides. It usually belongs to the Crown. However, over the course of time, large sections of the foreshore have been conveyed to adjoining proprietors.

The public has the usual rights of access on the foreshore under Part 1 of the Land Reform (Scotland) Act 2003. However, common law rights in relation to the foreshore existed before the 2003 Act, and provide more extensive public rights than are contained in the 2003 Act. In addition to the kind of activities that are covered by the 2003 Act (e.g. walking, bathing, picnicking and playing games) the common law gives the public the right to light fires, fish in the sea, gather shellfish, and shoot wildfowl above the foreshore or sea. These additional rights at common law only apply to the foreshore of the sea and other tidal waters, and so do not apply to the banks of non-tidal waters.

Access is available to the foreshore by boat from the sea, but the public can only use the foreshore from the landward side if there is a legitimate means of access by land. Access rights under the 2003 Act will now usually provide such a means of access, but not for motorised vehicles which are excluded from the Act. In the past, the need for access led to many disputes

about whether there was a right of way to the foreshore. A particular point on the foreshore can become a ‘public place’ in the sense of being a proper terminus for a right of way if the public have been in the habit of resorting to it for a particular purpose such as fishing, loading or unloading vessels, or bathing and recreation.

Liability.

Occupiers of land have a duty under the Occupiers Liability (Scotland) Act 1960 to take reasonable care for the safety of people coming onto their land. ‘Occupiers’ include landowners and others who have control of the land, such as tenants. As will be seen from the cases, occupiers are not usually liable when people are injured as a result of natural hazards on the land, provided that the dangers are obvious. However, liability is more likely to arise where children are involved. The issue of liability has been a concern raised by land managers as part of the introduction of statutory access rights, but section 5(2) of the 2003 Act clarifies that the duty of care owed by an occupier to another person on the land is not affected by this part of this Act or by its operation. There is a caveat for a compulsory path order made by a local authority under Section 22(1), whereby at section 22(4) regard may be had to whether the local authority has control of the path for the purposes of the Occupiers Liability (Scotland) Act 1960.

Occupiers may be liable if people are injured on the premises of facilities that they provide for visitors, such as toilets. But liability will only arise if the injuries are the result of the occupier’s negligence.

Special provisions may apply in relation to accidents caused by animals.

This Part also includes cases relating to liability of one recreational user to another, and cases relating to contributory negligence, i.e. where it is claimed that the claimant is partly or wholly responsible for his own injuries – leading to a reduction in any compensation awarded.

See also Scottish Natural Heritage’s publication A Brief Guide to Occupiers’ Legal Liabilities in Scotland.

Cases in Ken cover the following areas:

Occupiers’ liability: Cases involving ‘hazards’ in the outdoors

Occupiers’ liability: Cases involving children

Occupiers’ liability: Cases involving facilities/indoor

Cases involving animals

Cases under this heading may involve not only the Occupiers Liability (Scotland) Act 1960 but also the Animals (Scotland) Act 1987 or the common law of negligence. The 1987 Act imposes strict liability (i.e. without the need to prove negligence) on the owners of animals which by their physical attributes or characteristics are likely to injure severely or kill people or other animals. Dogs are deemed to fall within that description in cases where they bite, savage, attack or harry a person or other animal.

Liability of recreational users to one another

Cases relating to contributory negligence

Other cases of interest.

Reported Cases

Each reported court case is tagged to show which of the above areas it relates to. You can use these tags, shown at the bottom of a court case, to find other cases that cover the same area of interest:

Most of the cases listed are reported in various official law reports, which contain the full texts of the judges' opinions and summaries of the facts and the legal arguments on each side. The report reference consists of the year of the report followed by identifying letters for the series of reports and a page reference (e.g. 1945 SC 302 for a case reported in Session Cases in 1945). In addition, there are summarised reports (such as GWD - Greens Weekly Digest, and CLY - Current Law Yearbook) which only contain brief summaries of cases. In many recent cases, the full texts of judges’ opinions are also available on official court websites and references to these are also given, with the relevant court reference numbers, where available. The case report references enable lawyers to look up the full reports in the appropriate volumes in law libraries, but non-lawyers will probably find it easier to use the online court website references for recent cases. There is often additional information or comment available on the Internet.

Where a related case is available in Ken you can click on it to be taken to that case. Where a related case is not recorded in Ken the words “Not in Ken” confirm this.