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Our Ref : D900L6 **Your Ref** : **Date** : 2nd November 2011

Karl Boyle
Chief Executive Officer
Mountaineering Ireland
Sport HQ, 13 Joyce Way
Park West Business Park
Dublin 12

Re : Occupiers Liability Act 1995 - Bolted "*Sports Crags*"

Dear Karl,

You have briefed me in a matter in which a group of individuals entered private land in County Kerry and over a period of time developed a steep cliff into a modern "*sports crag*", without permission of the landowner. The landowner became aware of the situation. I am asked to advise as to whether or not there are any consequences for the landowner where the crag on his land is adapted for use as such a sports crag by the permanent fixing of multiple bolts into the rockface.

While a piton or bolt sits in one's hand it is easily classified as an "article". Pitons (or other "tat") are never fixed permanently to the land. They are capable of removal and re-use. Bolts are permanent, designed not to come out again, or at least not to come out so as to be capable of re-use. Pitons etc can. Bolts can be rendered, with effort, unusable, but cannot be moved and reused.

Bolted sports crags are therefore different in that regard to traditional crags, even traditional crags with an odd piton or suchlike. Once the bolt becomes permanently fixed to the land the law on the "*ownership of things*" provides that the ownership of the bolt moves to the landowner. It is annexed to the land so that it loses its separate character as an article and is regarded as part and parcel of the land. Pitons in place are "*fixtures*". Fixtures do not generally become part and parcel of the land.

This landowner is minded not to interfere with the amenity value of the crag provided there are no issues for him. He is though quite reasonably concerned and wants to know whether there are or may be legal issues and whether they should have concerns with regard to the matter generally.

The whole thing falls to be looked at under the Occupier's Liability Act 1995 (OLA95) which imposes a duty on the occupier of premises towards certain categories of entrants in respect of dangers on premises, danger defined as "*danger due to the state of the premises*". The very act of fixing bolts to the land changes the state of the premises. If because of being badly fixed or over many years the bolts fall into a dangerous condition, or are interfered with to their detriment, then the bolted crag might constitute a danger.

It may be that the risk of injury might be extremely remote or that the circumstances in which an injury might be suffered would give rise to special defences. It is not as if someone is going to trip over a bolt. However the fact is that the act of bolting has altered the state of the premises and the potential liability of a landowner has to be considered in light of the state of the premises as altered.

There are four main duties imposed on an occupier of premises towards visitors, recreational users or trespassers as follows:

1. **Section 3** imposes a duty on the occupier to what are classified as "*visitors*" to ensure that they do not suffer injury or damage by reason of any danger existing on the premises. While much of this opinion focuses below on the question of whether or not a sports crag is a "*structure*", this section may impose a duty to "*visitors*" to ensure they do not suffer injury by reason of the sports crag. Now the reality is that the sports crag will undoubtedly be used exclusively by recreational users and not visitors, indeed such a situation is a very specific speculation, but this potential risk must be flagged. Without bogging down, visitors are *entrants* on the land to visit the landowner or his family rather than the land – guests, postmen, insurance salesmen, gardai etc. This is hardly a worry in the present case ?

2. **Section 4(1)(a)** imposes a duty towards "*recreational users"* on the occupier "*not to injure the person or damage the property of the person intentionally*". In essence that means not to assault the person. I don't see it as a problem that any landowner or anyone else owes a duty to anybody not to assault people. The entrants who would be considered here are categorised as "recreational users". This is so notwithstanding that they didn't have permission to enter on the land or might not in the future have permission, because in either event they are present on the land "*without a charge*" and also "*for the purpose of engaging in a recreational activity*". It matters not that their entry on the land would be seen in the ordinary sense as trespassing, because the duty owed to a recreational user and a trespasser is the same. Even if there is permission there is no greater duty of care.

3. **Section 4(1)(b)** imposes a duty on the occupier towards recreational users "*not to act with reckless disregard for the person or the property of the person*", which duty might be triggered for instance by a history of climbers falling from broken bolts or bolts otherwise failing. Section 4(2) states "*in determining whether or not an occupier has so acted with reckless disregard, regard shall be had to all the circumstances of the case........*". I am absolutely satisfied that a landowner permitting activity on the landowner's land is not acting with reckless disregard for the persons concerned. This is so even though the activity in question is hazardous or even extremely hazardous. The persons who engage is such activities have to look out for themselves. You will be familiar with the Supreme Court decision in Geraldine Weir-Rogers -v- The S.F. Trust Limited given on 21st January 2005. What I am saying in this regard is well settled and doesn't cause any worry, for instance, to any of the farming organisations, or to Coillte, who are the biggest landowner in the country and have an open door policy as regards public amenity values.

3. **Section 4(4)** imposes an additional duty in certain cases on the occupier towards recreational users

   "*where a structure on premises is or has been provided for use primarily by recreational users, the occupier shall owe a duty towards such users in respect of such a structure to take reasonable care to maintain the structure in a safe condition*".

Under this provision the landowner could have unwittingly incurred an additional duty of care to recreational users to maintain the sports crag in a safe condition, if the sports crag is to be regarded as a "*structure*".

Please note that this sub-section of the Act does not differentiate between structures put there

- by the landowner for the recreational users as opposed to put there by the recreational users themselves, or
- whether, in the latter case, it is with or without permission of the landowner.

It is only required that the structure is provided, as is the present case, for *use primarily by recreational users*.

This is where the real concern lies.

The Act in such circumstances imposes on a landowner as an occupier a duty to recreational users to take reasonable care to maintain any *structure* in a safe condition. The reality is that the landowner may not in a position to do that in cases such as the present.

The question arises as to whether a sports crag is a "*structure*". It seems to me that (absent the specific unusual situations hypothesised above) a landowner can unconcernedly permit traditional rock climbing by recreational users on a cliff on land without falling foul of 3, 4(1)(a) or 4(1)(b), and 4(4) doesn't arise. However the situation may be different with a sports crag, if what we are dealing here is "a structure on premises" that "has been provided for use primarily by recreational users", so that section 4(4) applies. Obviously a landowner would be concerned if the very development of a sports crag, if a sports crag is a "structure", was to impose upon him an obligation to "recreational users".

The word "*structure*" is not given any special or technical meaning in the Act. In those circumstances it is interpreted according to its ordinary and plain meaning, having regard to the context of the Act. Accordingly we are not concerned with a definition that might be adopted for instance in chemistry, geology or business organisation.

Articles that become annexed to the land can be structures e.g. stones are brought into a field and built up as a wall. The wall is annexed to the land but it would also be regarded as a structure. A dry stone wall would be as much a structure as a mortared stone wall.

While at first sight one would not instantly point to a series of single bolts and necessarily or immediately assume "*structure*". One would have to pause and consider the matter. As with many things in life the classification of features can become problematic at the margins, and ultimately a Court may have to make a determination that a feature is or is not a "*structure*".

The dictionary definitions of structure vary. It could be said to refer to something made of various components i.e. something that is constructed. The dictionaries use phrases such as "a set of interacting parts", "a framework", "a whole constructed unit", "the arrangement or organisation of parts in a system", "the way individual parts of something are made, built or organised into a whole".

The bolts are not physically connected one to another, nor are they interdependent on each other for their support. In this respect it could be argued that it is not a structure. If for instance one were to meet one of the bolters coming away from the crag and engage in conversation, would they say - "I am building a sports crag" or would it be nuanced - "I am developing a sports crag"?

My understanding is that this is one of the first times a bolted crag has appeared in the wild in Ireland. It appears that subsection 4(4) of the Occupiers Liability Act 1995, which was intended to relieve landowners of worrying duties to recreational entrants and the like, in the interest of striking a balance between private property rights and public amenity aspirations, does not relieve a landowner of this category of land from this category of worry. Quite the reverse in fact ? Landowners permitting hill walkers and rock climbers to walk, scramble or climb all over their property have no such worries. It would appear however that sports climbing is legally different, because of the degree of human interference in crafting the structure exploited for the purpose of the sport.

It appears to me that one would have to conclude that there is at least the possibility that a Court could find that a matrix of individual bolts fixed to a crag face constitutes a structure. I am grateful to Cormac Ó Dúlacháin S. C. for his input into this opinion, and he stresses that predicting what a given judge on a given day would decide with regard to a brand new interpretation of poorly drafted legislation can only fit into categories such as possible/probable.

The disappointing part of all this is includes that surely

- The risk is actually very marginal.
- Any climber who did fall and injure himself because a bolt failed would undoubtedly be guilty of a high degree of contributory negligence. Sports climbers would surely have a duty to judge the quality of the individual bolts just the same as traditional climbers judge the quality of rock, pitons in place, tat etc. Personal responsibility is a core ethos of all climbing.

Yours sincerely,

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