

Scottish Government

**Consultation on developing a safety system for
Adventure Activities in Scotland**



A response by the Association of Personal Injury Lawyers

30 March 2012

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 5,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Introduction

APIL provided input into the health and safety review conducted by Lord Young of Graffham in 2010, which culminated in the publication of the report, Common Sense Common Safety. We then provided a response to the Health and Safety Executive (HSE) for England and Wales when they consulted on proposals to replace the licensing regime for Adventure Activities in England and Wales following Lord Young's recommendation in his report. In this response we reiterate some of our comments made previously there regarding health and safety regulations as well as providing specific input into the Scottish Government's proposal to provide a safe system for adventure activities in Scotland.

Executive Summary

APIL welcomes the opportunity to respond to the Scottish Government's consultation regarding the development of a safety system for adventure activities in Scotland.

- As parents may rely on the existence of the licensing regime to assure them of an activity centres' standards, so may public bodies. If the licensing regime is removed, local authorities will have to conduct more detailed risk assessments to ensure that activity centres are of a certain standard and will provide a safe environment for children. The cost of safety is therefore transferred from the activity centre to the local authority.
- We are not dealing with adults in these cases. The Act and licensing regime were introduced to protect persons under the age of 18 and vulnerable people such as those in care or with a physical or mental disability. Those that campaigned for the introduction of regulation following the disaster at Lyme Bay managed to convince the HSE that children are entitled to a greater measure of care than the general public¹. The risks presented by the four activities, as defined in the Act, are high risk. Outdoor activities, without proper regulation, are dangerous and can result in loss of a life or limb.

¹ <http://www.aals.org.uk/lymebay01.html>

- Parents sending their children to centres such as these want their children to enjoy an educational experience and be sure that they will be safe. A regulated licensing regime provides that surety to parents.
- Valuable lessons can be learned from the lack of regulation of activity centres prior to introduction of the Act in 1995. Watering down rules which have helped ensure children's safety will expose them to the risk of harm in the future. The best way to cut costs is to prevent negligence which causes needless injury in the first place.
- The HSE should look to develop the current licensing regime to cover a wider range of activities than those currently defined in the Act and prevent needless injury in the first instance.

Consultation Response

APIL supports Option 3 which provides for the provision of a statutory scheme. The risks associated with any adventure activities are such that we cannot support any of the other options provided by the Scottish Government.

Valuable lessons can be learned from the lack of regulation of activity centres prior to introduction of the Act in 1995. Watering down rules which have helped ensure children's safety will expose them to the risk of harm in the future. The best way to cut costs is to prevent negligence which causes needless injury in the first place. Health and safety laws provide protection from needless injury. They also help to ensure redress and rehabilitation for injured people, which in turn limits the call on the state to provide care and benefits. Any assault on health and safety as a way of curtailing what is perceived to be too much regulation is aiming at the wrong target. Therefore, replacing a licensing regime with a "light touch" Code of Practice is not adequate when we are reminded of what happened at Lyme Bay in 1993.

The following insert from David Cameron's foreword to Lord Young's report was included in the consultation paper from the HSE for England and Wales,

"Good health and safety is vitally important. But all too often good, straightforward legislation designed to protect people from major hazards has been extended inappropriately to cover every walk of life, no matter how low the risk.

Instead, we're going to focus regulations where they are most needed; with a new system that is proportionate, not bureaucratic; that treats adults like adults and reinstates some common sense and trust.

A damaging compensation culture has arisen, as if people can absolve themselves from any personal responsibility for their own actions, with the spectre of lawyers only too willing to pounce with a claim for damages on the slightest pretext.

We simply cannot go on like this. That's why I asked Lord Young to do this review and put some common sense back into health and safety. And that's exactly what he has done.²

When considering the Act, it is important to remember the following:

- As the *Common Sense Common Safety* report confirms, in fact we do not have a "compensation culture". Lord Young states in the body of his report,

"The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality."

² *Common Sense Common Safety*, A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture, October 2010, page 5.

To embark on this radical change on the basis of a misguided perception would not be appropriate.

- We are not dealing with adults in these cases. It is there to protect persons under the age of 18 and vulnerable people such as those in care or with a physical or mental disability. Those that campaigned for the introduction of regulation following the disaster at Lyme Bay managed to convince the HSE that children are entitled to a greater measure of care than the general public³.
- The risks presented by the four activities, as defined in the Act, are high risk. Outdoor activities, without proper regulation, are dangerous and can result in loss of a life or limb.
- Regulation in this area is most needed. These regulations have prevented needless injury.
- In the event of another tragedy, any downgrading that takes place of the current requirements could easily create a situation in which the finger of blame would be pointed at the legislators, both in terms of media reaction and potential litigation.

A voluntary code, without strict sanction, would have a limited effect on the people it aims to help. This is further endorsed on the Adventure Activities Licensing Authority website where the following statement was taken⁴.

"At the trial in December 1994 of the company and its managers who ran the activity centre in Lyme Regis responsible for the ill-fated canoeing trip, the Judge, Mr. Justice Ognall, made a powerful call for an immediate and thorough appraisal of the running of activity centres. He said the potential for injury or death was too obvious for safety procedures to be left "to the inadequate vagaries of self-

³ <http://www.aals.org.uk/lymebay01.html>

⁴ <http://www.aals.org.uk/lymebay01.html>

regulation." He added that authoritative control, supervision and if necessary, intervention was essential.'

The HSE undertook a survey of activity centres which started in 1993, which was published in April 1996⁵. The survey concluded that,

"the proposed licensing scheme for certain prescribed activities should improve further the safety standards....".

The work of the licensing regime was further endorsed in the review undertaken by the DfEE in 1999 together with a consultation document from the HSE,

"Overall, the majority of respondents to the review were of the opinion that the scheme "was doing its job" and three quarters said it should continue....On 10th December 1999, the Schools Minister, Jacqui Smith announced that the scheme will continue, "in order to provide an assurance that pupils can take part in adventure activities safely." It is clear that the scheme exists not only to promote safety in the provision of outdoor activities to children, but also to "provide an assurance" to the public that the activity provider has been inspected and is operating to acceptable safety standards. This latter point, of "providing an assurance" will be key to the credibility and acceptability from the public's point of view, of any scheme that supercedes the existing regulations.⁶"

This is paramount when considering the safety of children and vulnerable people when undertaking an outdoor activity. Parents sending their children to centres such as these want their children to enjoy an educational experience and be sure that they will be safe. A regulated licensing regime provides that surety to parents.

The licensing of activity centres can be compared with learning to drive. A person undertakes driving lessons and must pass a driving test, which both cost money, in

⁵ <http://www.aals.org.uk/lymebay01.html>

⁶ <http://www.aals.org.uk/lymebay01.html>

order to obtain a driving license which is then purchased from the Driver and Vehicle Licensing Agency (DVLA). This is to ensure that the person is considered to be safe when driving on the roads for the protection of others who use those roads. The DVLA would most probably never consider the removal of the test stage of this process and replacing it with a request to read the Highway Code. Licenses are important and necessary to prevent harm.

Another factor which also requires further consideration is the increased cost to the public sector. As stated above, the grant of a license to an outdoor activity provider went a good way to providing assurance that pupils could take part in adventure activities safely. If the license regime is removed, those that use these activity centres, namely schools and youth groups, will have that reassurance removed and, therefore, will have to rely on alternative considerations. For example, the additional burden of a license on a business may have to be replaced by additional burdens on schools and teachers to conduct increased or more thorough risk assessments of these activity centres in order to ensure that they are as safe as possible.

As parents may rely on the existence of the licensing regime to assure them of an activity centres' standards, so may public bodies. If the licensing regime is removed, local authorities will have to conduct more detailed risk assessments to ensure that activity centres are of a certain standard and will provide a safe environment for children. The cost of safety is therefore transferred from the activity centre to the local authority. In the current economic climate, when public money is already stretched, it is possible that more thorough risk assessments will become overlooked and that we will be placed in the position we were in before the disaster at Lyme Bay. Increased costs associated with more thorough risk assessments and higher insurance premiums could leave schools with no option but to cancel school trips. This would obviously add to the perception of a compensation culture, which the HSE tries to diminish. Society's perception of health and safety regulation was proven recently by the closure of 'Murray Mount' by the Lawn Tennis Association (LTA) and All England Lawn Tennis and Croquet Club (AELTC), which was criticised

by the HSE⁷. The reality is that a certain perception of health and safety regulation has been created and would be further fuelled by these proposals.

The HSE and the Scottish Government should instead look to develop the current licensing regime to cover a wider range of activities than those currently defined in the Act and prevent needless injury in the first instance.

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⁷ HSE responds to LTA / AELTC decision to ban spectators from Murray Mount 'on health and safety grounds', <http://www.hse.gov.uk/press/record/2011/ltaaeltc210611.htm#?eban=rss-putting-the-record-straight>