

The criminalisation of outdoor recreation during the Covid-crisis

Description

Two weeks ago, two women who had travelled from Fife to walk up Ben Lomond and called the rescue team were charged with Culpable and Reckless Conduct ([see here](#)). Last week two men who had travelled from Glasgow to Ben Nevis and had to be rescued from Minus Two Gully were issued with a fixed penalty notice for breaching the coronavirus regulations ([see here](#)). The first is a very serious offence, with a maximum penalty of life imprisonment. The second is a minor offence (£60 fine reduce to £30 for prompt payment), which is dealt with administratively (like a parking ticket) and which does not result in a criminal record. The very different police responses in the two cases raise some fundamental questions as to how the criminal law is being applied to outdoor recreation.

First, it's worth clarifying my own position ([see also here](#)). I do not agree with current attempts to restrict people to taking outdoor recreation within 5 miles of their own local authority area. This is unfair, as it impacts on people in cities far more than people living in say Highland, and in my view there is no public health justification for it, because it is quite possible to drive out of cities, have a great day out and pose no risk of spreading the virus to anyone. It is important to note, however, that legally, the Coronavirus Restriction Regulations might allow for some "travel" for outdoor recreation as the list of reasonable excuses for travelling out with one's own local authority area is non-exhaustive. It is still possible therefore that breaking the five mile "rule" could be justified legally, if for example a person's own area is very crowded or lacking in recreational opportunities. But if people decide that travelling more than five miles outside their area is justified, it is clearly essential that they take all reasonable precautions to avoid spreading the virus: avoiding shops and petrol stations and any other contact with local communities; maintaining 2m physical distancing; hand hygiene when touching gates etc.

I would like to see the Restrictions Regulations amended to put this beyond doubt, to make it legal for people to travel for outdoor recreation as long as they take all reasonable efforts to avoid contact with others and spreading the virus. At the present time, that would preclude travel by public transport. It would not mean "unbridled" outdoor recreation could resume. All the other coronavirus restrictions, such as the number of people you can meet up with outdoors (currently one), would apply.

Importantly, a requirement to avoid contact with others would entail people moderating their recreational activity to reduce any risk of having to call out the Mountain Rescue. It's worth noting that the risks here are as much about mountain rescue team members spreading the virus among themselves as catching it from a person needing to be rescued. So, before undertaking any form of outdoor recreation which might end up in you calling the mountain rescue, people need to think not just about the risks they pose directly, but the associated risks of spreading Covid.

To return to the recent cases, I believe it should be quite acceptable for someone with winter mountaineering skills to head up Ben Lomond in the snow or for a Grade VIII climber to choose to go and climb Minus Two Gully (Grade 5) in the current circumstances, wherever they come from. Where people are doing things well within their capabilities, the risks of them needing to be rescued are very low.

This is not being elitist, it's an argument that everyone has a responsibility to moderate what they do and is in line with Mountaineering Scotland advice ([see here](#)) *to use your judgement to reduce risks*.

While the details of what led to these two rescues are not public, it appears that in both cases the people concerned had not moderated their plans to take account of their experience and got themselves into difficulties unnecessarily. In normal times challenge is an integral part of adventurous outdoor activities, which is why Mountain Rescue Teams generally are so supportive of people who get themselves into such situations. But these aren't normal times and, while in both cases the people were able to walk off the hill reducing the risk to the rescue teams involved, the police, who are involved in every rescue, could hardly ignore what happened.

The Fixed Penalty Notice for breaching the coronavirus restrictions issued to the two climbers who called the rescue on the Ben therefore appears fair. It does raise questions, though. If two climbers from Fort William had got themselves into exactly the same position and needed rescuing, they would not have been guilty of any offence under the coronavirus regulations. That strengthens my argument that it is not travel for outdoor recreation which is the issue, but rather people not using their judgement to reduce risks. Whether its possible or desirable to regulate that by law is another matter.

Yet that is precisely what has happened to the two women in the Ben Lomond case who had traveled from Fife. They have been charged not with breaking the coronavirus regulations but with culpable and reckless conduct. Culpable maybe, but reckless? The case law is clear, reckless means reckless. This charge has been used against people who have organised large indoor parties during the lockdown, where there are clearly very high risks of spreading the Covid-19. It has also been used against people who have had unprotected sex with another person without telling them they had HIV. Neither of these examples, while both about the spread of disease, appear comparable to the two women hillwalkers.

But perhaps the police have evidence that the women deliberately set off up Ben Lomond with the intention of bringing large numbers of rescuers into close contact, like the organisers of the Covid parties, or that they had both just had positive Covid tests and refused to put on face masks when rescued? It appears to me far more likely that the two women were aware of their lack of experience and because of that chose to walk up Ben Lomond, a hill with a large path and normally lots of people using it in other words an apparently safe choice. But, as sometimes happens on the hill, suddenly all the people disappear, footprints get filled in by blowing snow and they were left stranded. A mistake, but reckless?

The explanation for the differential application of the law across the country

In general, it appears that the police during the most recent lockdown have adopted the position I am advocating. Most are not concerned about people who have traveled for recreational activities, so long as they are behaving responsibly. That is to be welcomed.

There are exceptions. A couple of weeks ago I heard about a hillwalker who had been threatened with a Fixed Penalty Notice after after walking up Ben More at Crianlarich. The person concerned had to explain to the police officer that they lived within the Stirling Council area. Then, when the officer

maintained travelling more than five miles within a council area was illegal, they had to show the officer the regulations on their phone. If the person had come from another local authority, bang! There are officious police officers out there. But there are also very different attitudes between different divisions of Police Scotland.

Besides the harassment of the Ben More hillwalker, the two Culpable and Reckless charges against hillwalkers ([see here for Crianlarich Case last year](#)) have both been in the Stirling division. That is not, I believe, a coincidence. Not only are the cases all in the one division but they are also all in the Loch Lomond and Trossachs National Park. For six years now the Loch Lomond and Trossachs National Park Authority, which has a statutory duty to promote public enjoyment of the countryside, has been doing the opposite, blaming, controlling and penalising people who want to do outdoor recreation. Working in partnership with police and local authorities they have created a toxic culture in which use of the criminal law to manage people enjoying the countryside has become the preferred visitor management option.

The camping byelaws, originally justified as a means of tackling anti-social behaviour, were used last summer by the police in the National Park to criminalise people who had decided to get out into the countryside before lockdown was fully released. Camping was almost certainly far safer than staying in the cities and people who camped elsewhere were not charged. However, in the National Park more people were charged in a single season than in the total period since the camping byelaws first came into force. That should be a matter of serious public concern. On the south shore of Loch Lomond, at Balloch, the Dumbarton Police Division had up until the end of May last year issued proportionately more Fixed Penalty Notices for breaching the Coronavirus Regulations than anywhere in the country ([see here](#)).

Alongside this police activity, there has been a crackdown on irresponsible parking. According to the report to the LLTNPA Board in December *last year In total Stirling Council enforcement staff issued 828 Fixed Penalty Notices with 550 Parking Charge Notices also issued through contractors.* The figures don't lie. The Loch Lomond and Trossachs National Park has rapidly become the least welcoming place for outdoor recreation in Scotland.

The explanation for all of this is that instead of trying to address the lack of infrastructure in the National Park, for which they are responsible, the LLTNPA and our public authorities chose to blame the public for the problems, started to use the criminal law as the primary means of managing visitors and then started to extend its scope without any consideration of the consequences. That is something that really does deserve to be called RECKLESS. The actions of our Public Authorities in the Loch Lomond and Trossachs National Park have massive implications for access rights in Scotland and all who enjoy outdoor recreation should be concerned about what is going on..

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