Scottish Law Commission

(SCOT. LAW COM. No. 97)

OBLIGATIONS

REPORT ON CIVIL LIABILITY IN RELATION TO ANIMALS

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Maxwell, *Chairman,*
Mr. R. D. D. Bertram, W.S.,
Dr. E. M. Clive,
Mr. J. Murray, Q.C.

The Secretary of the Commission is Mr. R. Eadie. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

SCOTTISH LAW COMMISSION

Item 13 of the First Programme

OBLIGATIONS

CIVIL LIABILITY IN RELATION TO ANIMALS

To: The Right Honourable the Lord Cameron of Lochbroom, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on Civil Liability in Relation to Animals.

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
12th July 1985

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PART I INTRODUCTION: GENERAL PRINCIPLES OF LIABILITY

Background to Report

1.1 In August 1982 we published our Consultative Memorandum No. 55, "Civil Liability in Relation to Animals". This was originally included as an item under Obligations in our First Programme (1965) of law reform as part of a consideration of the law relating to strict liability, with particular reference to the Twelfth Report of the Law Reform Committee for Scotland.[1] However, other priorities kept us from starting on the topic as we had planned, and at first there was very little pressure in Scotland for reform in this area of the law. Quite recently this has changed as problems involving animals have increasingly highlighted defects in our existing rules. The topic has also been studied extensively in numerous other jurisdictions and has been the subject of major reform in England and Wales (Animals Act 1971). Finally, the important Royal Commission on Civil Liability and Compensation for Personal Injury, under the chairmanship of Lord Pearson, has suggested that the Animals Act 1971 should be extended to Scotland.[2] This is not a solution which we favour generally, though some of our proposals for reform do in fact correspond quite closely to provisions contained in that Act.

1.2 Because of the nature of the topic we also published a short pamphlet, "Liability for Animals", and a questionnaire, intended for the use of members of the public who might have a contribution to make to our work but neither time nor inclination to study the detail of our consultative memorandum. There was a wide response to both publications from interested individuals and from representative bodies concerned with animal welfare, farming and land use, business and local government, as well as from legal bodies and academic and professional groups and individuals.[3] We are most grateful to all those who commented and in particular to those who gave us the benefit of their practical experience in an area where this is of vital importance.

Civil liability

1.3 Our proposals in this Report are directed to defects in certain rules of law which may be invoked by an individual against the keeper of an animal to compel him to pay compensation for harm caused by the animal. Broadly, anyone who owns an animal, or has it in his possession, is a keeper of the animal. In appropriate circumstances, a keeper is said to be liable under these rules for the harm caused by his animal, or to be liable for his animal. The law, that is, imposes liability upon him and obliges him to make reparation. Harm may take the form of personal injury, injury to animals or damage to property. All species of animals are included, at least in principle, although, in fact, only very few species commonly cause harm.[4]

1.4 This liability is referred to as civil liability. Civil liability contrasts with criminal liability, that is liability to criminal sanctions, which may sometimes

[1] "The law relating to civil liability for loss, injury and damage caused by animals", Cmnd. 2185 (1963).

[2] Report, Cmnd. 7054 I–III (1978), Vol. I, para. 1626, p. 339.

[3] A list of those who submitted written comments is printed in Appendix B.

[4] Consultative Memorandum No. 55, Appendices II–IV.

be founded on the same facts as give rise to civil liability. The prohibitions of the criminal law are not of direct interest to us in this Report, but we will occasionally refer to them where we think there may be instructive analogies with civil obligations. Likewise, we are not concerned directly with the many administrative controls which apply to the keeping of animals, for example licensing requirements, import and export restrictions, animal health measures, and so on. We will, however, touch on some of these where they are particularly relevant to our primary topics. Finally, as regards liability for injury to animals, we are mainly concerned with this where the injury is inflicted by other animals. That is, we do not consider the law which is directed to the general protection of animals.

Liability for animals as a separate legal topic

1.5 Many of the rules giving rise to liability in relation to animals are merely specific applications of more general rules which apply to many different sorts of harm-causing activity. It is arguable that it is always human agents who cause harm, and if they often act through other instruments, in principle it may not matter whether these instruments are motor vehicles or dangerous substances, for example, or animals. It may be thought unprincipled, therefore, to treat liability for animals separately from liability for other forms of harm caused.

1.6 However, as well as rules of liability of general application, there are also special rules which apply only in the case of animals. These rules are part of a very old tradition. The Winter Herding Act 1686, which deals with damage done by straying livestock, is still extant. The common law rule which requires the owner of an animal of known dangerous or harmful propensities to confine it effectually has survived from the same period.[1] There are also more recent enactments in the same tradition, the Dogs Acts 1906 to 1928, for example. For reasons which we will explain subsequently, we think that there is a good case for continuing this tradition of having special rules for animals, in addition to the existing rules of liability of general application, and that this justifies treating liability in relation to animals as a separate legal topic.

1.7 Apart from these considerations, the problems associated with animals are characteristically different, and this is another reason for separate treatment. Animals are part of many diverse activities most of which are not harmful in themselves, although they may become so simply because they involve animals. The presence of animals, that is, may actually be the criterion for classifying certain activities as potentially harmful, and this is surely because animals, by their very nature, are different from other instruments of harm. In some sense they can be said to be capable of action, to be themselves free agents, as it were. They are always to a greater or lesser extent independent of those who manage or exploit them. The right to keep animals, therefore, must constantly be balanced against the need for effective control.

1.8 In our consultative memorandum we illustrated the wide range of characteristic problems associated with animals under several headings: livestock; working animals; animals kept for sporting purposes, including

[1] Stair, *The Institutions of the Law of Scotland* (1681, 1832), 1.9.5 is generally considered as the source of this rule.

game; domestic pets; and wild animals, including exotic animals kept as pets or for the purposes of display or entertainment, wild animals which are farmed, and protected species.[1] What this shows is that the issue of whether or how particular animals can or should be controlled must be central in any consideration of liability; and that that issue can arise in a great variety of situations. This variety is evident in a number of aspects—the natural propensities or trained characteristics of different animals, the roles or capacities of keepers, the restraints which are feasible, the activities of which animals are part. These are simple points but worth making, because it is not always easy to be objective about animals. Many organisations exist to promote particular interests in relation to animals, and it may often be easier to sympathise with keepers of animals, of whom there are many, than with those suffering harm, of whom there are relatively few.[2] But if the law is to be satisfactory, equitable and consistent solutions must be found for all the various problems. This means that the multiplicity and variety of the problems must first be properly acknowledged.

1.9 There are also some very particular problems which have been drawn to our attention recently, few in number, but of great public concern. These are the problems of livestock straying, in particular straying on busy roads; dogs worrying livestock; and, more generally, dogs roaming in towns and cities without adequate supervision. Given the scale of these problems, and the degree of public concern, the need to review our rules of liability in this area has become more urgent than it might have been otherwise, although it is arguable that quite other solutions are also required, to some of the problems at least. And, indeed, more radical solutions are now being canvassed widely.[3]

1.10 Finally, there are also precedents for treating the topic separately as we propose. In many jurisdictions similar exercises have been carried out, and this is at least a pragmatic justification for the course we have taken. In particular, we have before us the very influential example of the recent major reforms in England and Wales in this area of the law. We have already referred to these reforms and the consequent pressure in some quarters to adopt them in Scotland.[4] We are concerned that this should not happen, at least without a thorough debate founded on a detailed examination of the existing law in Scotland. In fact, as we mentioned and as subsequent discussion will make clear, our view of this issue is that simply importing the Animals Act 1971 would not be satisfactory.

General principles of liability

1.11 The starting point for any examination of the rules of liability in relation to animals must be the recognition that the law of delict, which is predominantly non-statutory, is firmly based on fault, in the sense of negligence, or deliberate wrongdoing; and in what follows this is the sense we intend when we refer without qualification to liability based on fault. The

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[1]Consultative Memorandum No. 55, paras. 1.6–1.20.

[2]The Report of the Working Party on Dogs (1976), published by the Department of the Environment, lists in Appendix F, pp. 39–40, more than 40 consultee organisations concerned with animals, nearly half of those with dogs.

[3]See Part V below.

[4]Para. 1.1.

principle itself is somewhat trite, that liability to make reparation should be imposed where harm is caused intentionally, for example, to particularise to the case of animals, by a horseman who deliberately rides his horse at a pedestrian.[1] However, it is much less trite that liability should be imposed for harm caused negligently, that is by failure to exercise reasonable care.

1.12 Where anyone, including therefore the keeper of an animal, is alleged to have been negligent, what must be proved is that he owed a duty to take care to the person complaining of harm; that his behaviour, by falling short of the standard prescribed by law, was in breach of that duty; and that his breach of duty actually caused harm.[2] Broadly, a duty of care, as it is called, exists where harm is a reasonably foreseeable consequence of the behaviour in question.[3] Behaviour is in breach of such a duty if it falls below the standard of the prudent and reasonable man acting on ordinary considerations.[4] In specialised activities basic skills or the observance of appropriate customary practices may be required.[5] In determining that a duty of care exists in novel circumstances there is an irreducible element of policy, and if the harm caused seems too remote from the behaviour complained of, the behaviour may be treated in law as not having caused the harm.[6]

1.13 The courts have recognised many specific duties in relation to animals. For example, a farmer owes a duty of care to his employees to ensure that safe methods of working with livestock are in use on his farm;[7] a duty to those using rights of way over his land not to pasture potentially harmful animals, such as bulls, in places where they would be a source of danger;[8] a duty to neighbours to prevent his livestock from straying on to their land and injuring animals there, or causing other forms of loss;[9] in some circumstances, a duty to users of the highway not to allow his animals to wander there;[10] a duty when taking livestock into public places to ensure that they are competently supervised in accordance with customary and appropriate precautions (auctioneers and dealers are under a like duty).[11] Animals put to work should be suitable for the purpose and should be placed in the charge of experienced handlers and worked safely.[12] The same standard of care is required of those driving horse-drawn vehicles as of drivers of motor vehicles;[13] and those in charge of horse-drawn vehicles also owe a duty of care to members of the public not to leave their vehicles unattended in public places where it might be dangerous to do so.[14] Shows or sports involving animals should be run

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[1] *Ewing* v. *Earl of Mar* (1851) 14 D.314.
[2] *Clelland* v. *Robb* 1911 S.C. 253.
[3] *Donoghue* v. *Stevenson* 1932 S.C. (H.L.) 31.
[4] *Clelland* v. *Robb* 1911 S.C. 253.
[5] *Gilligan* v. *Robb* 1910 S.C. 856; *Harpers* v. *Great North of Scotland Railway Co.* (1886) 13 R.1139.
[6] *Gray* v. *North British Railway Co.* (1890) 18 R.76.
[7] *Henderson* v. *John Stuart (Farms) Limited* 1963 S.C. 245.
[8] *Lanarkshire Water Board* v. *Gilchrist* 1973 S.L.T. (Sh. Ct.) 58.
[9] *Lindsay* v. *Somerville* (1902) 18 Sh. Ct. Rep. 230; *Dobbie* v. *Henderson* 1970 S.L.T. (Sh. Ct.) 27.
[10] *Gardiner* v. *Miller* 1967 S.L.T. 29.
[11] *Harpers* v. *Great North of Scotland Railway Co.* (1886) 13 R.1139; *Phillips* v. *Nicoll* (1884) 11 R.592.
[12] *Richardson* v. *Beattie* 1923 S.L.T. 440; *Ballantyne* v. *Hamilton* 1938 S.L.T. 219, 468.
[13] *Morrison* v. *M'Ara* (1896) 23 R.564.
[14] *Hendry* v. *M'Dougall* 1923 S.C. 378.

properly with due regard for the safety of spectators.[1] Horses should be ridden competently.[2] Dogs should be properly controlled, though there is probably no duty to ensure constant supervision.[3] The list of such duties can always be enlarged to meet the infinite variety of circumstances in which animals may cause harm.

1.14 The common law requirement of reasonable care is sometimes reproduced in statutory form as in the Occupiers' Liability (Scotland) Act 1960, for example. Under that Act the occupier of premises is required to show such care as is reasonable in all the circumstances to see that anyone entering on the premises does not suffer injury or damage by reason of any danger due to the state of the premises, or to anything done or not done there. Animals on the premises may conceivably represent such a danger in certain circumstances.[4]

Strict liability

1.15 As a result of the way the law has developed historically, certain exceptional cases are recognised, where liability is imposed by law without the need to prove breach of some duty of care owed to the complainer, or, as it is sometimes put, without the need to prove fault. This form of liability is referred to as strict liability, and all that is required in such a case is to show that injury or damage has been caused by the behaviour complained of. Where liability is based on fault, in the sense of failure to take reasonable care, it is always open to the defender to contest the issue of reasonable care, to seek to show that in fact he took reasonable care in the circumstances to avoid causing harm. In the case of strict liability no such defence is allowed, though other more limited defences may be available.

1.16 Where strict liability arises under statute it is sometimes referred to as absolute liability. The distinction turns on the defences which may be available. At common law, even when liability is strict, several defences are generally allowed:

(a) unavoidable accident, by which we mean the plea that the harm complained of is wholly due to extraordinary or calamitous circumstances "which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility"[5]—other terms used are *damnum fatale,*[6] *vis major*[7] and act of God or of the Queen's enemies;[8]

(b) intervention of a third party, which wholly excludes liability;

(c) act or default of the party suffering harm either in the form of

(i) contributory negligence, which excludes liability wholly or partly;[9] or

(ii) voluntary assumption of, or consent to, the risk of harm occurring *(volenti non fit iniuria),* which wholly excludes liability.

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[1] *Meldrum* v. *Perthshire Agricultural Society* (1948) 64 Sh. Ct. Rep. 89.
[2] *Lanark Plate Glass Mutual Protection Society* v. *Capie* (1908) 24 Sh. Ct. Rep. 156.
[3] *Thomson* v. *Cartmell* (1894) 10 Sh. Ct. Rep. 179; *Brown* v. *Soutar* (1914) 30 Sh. Ct. Rep. 314.
[4] D. M. Walker, *The Law of Delict in Scotland* (1981), p. 591.
[5] *Tennent* v. *Earl of Glasgow* (1864) 2 M. (H.L.) 22, *per* the Lord Chancellor at p. 27.
[6] *Tennent* v. *Earl of Glasgow* (1864) 2 M. (H.L.) 22.
[7] *M'Intyre* v. *Clow* (1875) 2 R.278, *per* Lord President Inglis at p. 290.
[8] *Henderson* v. *John Stuart (Farms) Limited* 1963 S.C. 245 at p. 247.
[9] Law Reform (Contributory Negligence) Act 1945.

These defences, or some of them, may be excluded or qualified in cases of statutory strict liability, depending on the terms of the statute in question. As defences are progressively curtailed, strict liability tends to absolute liability, though in fact the case where no defences at all are permitted would be extremely unusual.

1.17 One of the ideas underlying the imposition of strict liability is that exceptional risks, whether measured by frequency, seriousness or likelihood of occurrence, require higher standards of care. Strict liability, by limiting what the claimant must prove or curtailing the defences available against him, is thought by some to promote higher standards of care. The same idea finds expression in the ordinary rules of liability based on fault. Once it is established that a duty of care exists, the issue centres on the appropriate standard of care which the defender has allegedly failed to meet, and the courts have clearly recognised that greater risks, however measured, imply the need for more care.[1] Hence, more recently, as higher standards of care tend to be required in the application of the ordinary principles of negligence, the distinction between liability arising from failure to take reasonable care and strict liability is perhaps less sharp than it once was. For example, it is difficult to imagine a contemporary court taking the sanguine view of Lord Justice-Clerk Inglis in 1862, when considering a livestock farmer's obligations towards the employees whom he asks to handle bulls:

> "The pursuer speaks of two occasions when she was run at by the bull, and it is in evidence that on one occasion the meditated assault was prevented by Conchar throwing a basket at him, and on the other occasion by Hugh Clark throwing a stone at him. That evidence does not give me the impression of a dangerous bull at all . . . If the observation of the Steward-substitute were sound, that such an animal 'was a dangerous charge for a young woman', and that it was to be regretted 'that the exigencies of a farm should render such an allocation of labour indispensable', it might be difficult to hold that the employer was not bound to take precautions for her safety. But I must say that I know nobody so competent—certainly not the men about a farm—to take such a charge, and the Steward-substitute's observation is but a scurvy compliment to our Scots lasses employed in farm work."[2]

1.18 Nowadays, it may be easier to establish fault as the courts tend perhaps to impose a higher duty of care than in the past, and, to some extent, this may reduce the need for strict liability. But strict liability and liability based on fault are distinct conceptually. In our view, therefore, it is still necessary to consider whether there is a place for strict liability in relation to animals, and in fact our eventual conclusion is that it does have a place alongside liability based on fault.

Scope of Report

1.19 In Part II we discuss and criticise the present rules of strict liability in relation to animals from the point of view of their coherence.[3] Questions also arise concerning their appropriateness in relation to the practical problems

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[1] *Muir* v. *Glasgow Corporation* 1943 S.C. (H.L.) 3; *Gilmour* v. *Simpson* 1958 S.C. 477.

[2] *Clark* v. *Armstrong* (1862) 24 D.1315 at p. 1319. Compare *Henderson* v. *John Stuart (Farms) Limited* 1963 S.C. 245.

[3] These are the rules we refer to as the special rules in para. 1.6.

which actually occur. These questions reflect the very general issues which are inseparable from maintaining a distinction between liability based on fault and strict liability. In Part III we consider whether and, if so, how that distinction should be applied in the case of liability for animals. For this purpose it is necessary to consider a number of possible comprehensive schemes of liability for animals, with reference, as appropriate, to comparative sources. In Part IV we describe our proposals for legislation, and in Part V we take up some wider issues which are relevant to our concerns, though we make no specific proposals with regard to them. Our recommendations are summarised in Part VI and a draft Bill implementing them is set out, with Explanatory Notes, in Appendix A.

1.20 In our consultative memorandum we discussed nuisance in relation to animals.[1] Broadly, the law of nuisance allows damages to be recovered in respect of any use of property which causes trouble or annoyance to neighbours. We also discussed an analogous principle of liability for "dangerous escapes" which might possibly apply in the case of animals.[2] Liability under this principle depends on introducing on to land, or accumulating on land, something not there previously which is dangerous if it subsequently escapes. Partly as a result of our consultation, but mainly because of very recent developments in the relevant law, we have decided not to make recommendations in these areas in this Report.[3] We are satisfied that the issues on which we do make recommendations can be dealt with separately, and we leave open the question at this stage whether we should examine those other matters, possibly in a wider context, on another occasion.

1.21 Finally, we discussed, briefly, a provision contained in section 15 of the Agricultural Holdings (Scotland) Act 1949, whereby the tenant of an agricultural holding can obtain compensation from his landlord for damage caused by game.[4] Again, largely as a result of our consultation, we have decided not to treat this matter further. We think that, as a remedy within a particular statutory code, the provision can be regarded as properly self-contained.

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[1]Paras. 4.16–4.22.

[2]Para. 4.23. This principle was examined in the Thirteenth Report of the Law Reform Committee for Scotland, "The law relating to civil liability for loss, injury and damage caused by dangerous agencies escaping from land", Cmnd 2348 (1964). No changes in the law were recommended.

[3]See *R.H.M. Bakeries (Scotland) Ltd.* v. *Strathclyde Regional Council* 1985 S.L.T. 214.

[4]Para. 2.18.

PART II THE PRESENT LAW OF STRICT LIABILITY FOR ANIMALS AND ITS DEFECTS

Introduction

2.1 In this part we describe and assess the special rules which impose strict liability for animals. We are mainly concerned for the present with the coherence and adequacy of the rules as they stand. In the following part we will discuss how far they are appropriate in relation to current problems, and how far they should be retained or extended. We will consider in turn:

(a) the *scienter* rule, as it is sometimes called—that is, the common law principle of strict liability for injury or damage caused by animals of known dangerous or harmful propensities;

(b) the Winter Herding Act 1686;

(c) the Dogs Acts 1906 to 1928.

The *scienter* rule

2.2 The principle has long been recognised, at least since the 17th century, that keeping animals which, in the words of Stair, are "outrageous and pernicious" makes their masters liable for damage done.[1] Masters are liable, according to Stair, by virtue of their accession to their animals' delinquences "by connivance in foreknowing, and not hindering those, whom they might and ought to have stopped, and that either specially in relation to one singular delinquence, or generally in knowing and not restraining the common and known inclination of the actors towards delinquences of that kind." Examples cited in this early text are "the pushing ox, which if it was accustomed to push beforetime, the owner is liable for the damage thereof, as being obliged to restrain it"; and "mastives and other dogs, if they be accustomed to assault men, their goods and cattle, and be not destroyed or restrained." Most of the elements of the modern rule are already present in this statement, namely, foreknowledge, whether of singular delinquences or common and known inclination to certain forms of delinquence, or accustomed behaviour, together with failure to restrain.

2.3 What distinguishes the rule in its developed form from the ordinary principles of negligence, where liability is based on failure to take reasonable care, is that the complainer is exempt from the requirement to prove breach of a duty of care owed to him in the circumstances:

> "But when the ferocity of the [animal (a dog)] is quite well known to the owner his obligation is not one of reasonable care, but not to keep the [animal] at all, unless he does it in such a way as to make it perfectly secure. The distinction is most clear, and therefore the owner of the [animal] keeps it entirely at his own risk. He does not undertake that he will restrain the animal, but he must restrain, and, if he does not, he will be responsible for its acts."[2]

However, certain defences are available, since liability is strict not absolute. These are unavoidable accident (referred to as act of God or of the Queen's enemies);[3] intervention of a third party;[4] and act or default of the party

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[1] *The Institutions of the Law of Scotland* (1681, 1832), 1.9.5.

[2] *Burton* v. *Moorhead* (1881) 8 R.892, *per* Lord Justice-Clerk Moncrieff at p. 895; see also *Hennigan* v. *M'Vey* (1881) 9 R.411.

[3] See para. 1.16 and *Henderson* v. *John Stuart (Farms) Limited* 1963 S.C. 245.

[4] *Fleeming* v. *Orr* (1855) 2 Macq. 14, *per* the Lord Chancellor at p. 20.

suffering harm, both in the form of contributory negligence[1] and voluntary assumption of risk.[2]

2.4 The application of the rule now depends on classifying animals as either *ferae naturae* (wild) or *mansuetae naturae* (tame). It is presumed, as a matter of law, that the former, typically represented by the wild beasts, are known by all to be likely to cause harm if not restrained. The latter are typically the domesticated animals, and liability depends on actual knowledge that the individual animal in question has unusually vicious habits or propensities as manifested in previous behaviour.[3] The term *scienter* reflects just this emphasis on knowledge, and in fact derives historically from the name of the analogous action in English common law, which greatly influenced the early development of the Scottish rule and still survives in a modern reformulation in the Animals Act 1971.[4] The legal test determining the classification distinguishes between those animals which, according to the experience of mankind, are not dangerous to man (animals *mansuetae naturae*) and those which are (animals *ferae naturae*).[5] To that extent the test is open-ended, and, in practice, the matter must be determined by precedents and analogies.

2.5 Liability primarily attaches to the owner of an animal. But if the animal is not in the custody of its owner when it causes harm, its custodier may be liable. The contrast is between an owner who may exercise substantial control over the custody of his animal even if he exercises that control through another, and the fully responsible, independent custodier who may have long-term care of another's animal for his own purposes in full awareness of the precautions necessary.[6]

Criticisms of the *scienter* rule

2.6 Despite the existence of many legal precedents, there is still a considerable degree of uncertainty about the fundamental requirement of classifying animals. For example, there is not always liability where a wild beast causes harm;[7] nor are all domesticated species, as such, *mansuetae naturae.*[8] It is also possible, though not clearly affirmed, that sub-species may be distinguished as *ferae naturae* within species otherwise *mansuetae naturae.*[9] Moreover, the courts have had difficulty with very common species such as cattle. They are usually classified firmly as *mansuetae naturae,* but there is a tendency to treat them as having a natural propensity, as a class, to become temporarily agitated or unpredictable in some circumstances.[10] This leads to higher standards of care being required in actions founded on negligence, but does not quite bring the animals within the class of animals *ferae naturae.*

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[1] *Gordon* v. *Mackenzie* 1913 S.C. 109.

[2] *Daly* v. *Arrol Brothers* (1886) 14 R.154.

[3] *Clark* v. *Armstrong* (1862) 24 D.1315.

[4] Section 2, for which see the preceding Report of the Law Commission for England and Wales, "Civil Liability for Animals", (1967) Law Com. No. 13.

[5] *Fraser* v. *Pate* 1923 S.C. 748.

[6] *Cowan* v. *Dalziels* (1877) 5 R.241.

[7] *Bennet* v. *Bostock* (1897) 13 Sh. Ct. Rep. 50.

[8] *Hennigan* v. *M'Vey* (1882) 9 R.411.

[9] *Renwick* v. *Von Rotberg* (1875) 2 R.855.

[10] *Phillips* v. *Nicoll* (1882) 11 R.592; *Harpers* v. *Great North of Scotland Railway Co.* (1886) 13 R.1139.

Some species, cats for example, are almost impossible to classify.[1] Finally, the test of dangerousness to man, according to the experience of mankind, is not free of ambiguity. The experience of an animal elsewhere than in this country may or may not be relevant.[2] As regards "dangerousness to man", liability has been imposed in relation to an animal *ferae naturae* causing injury to animals as opposed to man.[3] But it is not clear how the criterion applies in relation to damage to other kinds of property. It may be that it is a prerequisite of liability in such cases that the animal is also, potentially at least, a danger to persons, and that animals cannot be classified as *ferae naturae* if they are a hazard to property only.

2.7 There are also major difficulties about what, precisely, might constitute unusually vicious habits or propensities in an animal *mansuetae naturae* for the purpose of imposing liability on an owner or custodier with knowledge of them. One condition, which previously applied in England and Wales, and probably still applies in Scotland, is that the past behaviour of which there is knowledge and the behaviour complained of should exhibit the same kind of viciousness.[4] This, though apparently reasonable, may lead to artificial distinctions. For example, in England, a propensity to attack animals was regarded as distinct from a propensity to attack human beings, though the converse did not hold;[5] and a propensity to attack one sort of animal was distinguished from a propensity to attack another sort.[6] More fundamentally, there may be a problem about ascribing intentions to animals. If apparently aggressive behaviour in fact lacks malevolence, however that is to be shown, it may not be regarded as vicious or dangerous even though it has resulted in harm.[7] If a more objective approach is taken to avoid this difficulty, the rule may simply come down to the unhelpful tautology, that any form of behaviour which actually results in harm may be regarded as a manifestation of a harmful propensity to behave specifically in that way:

> ". . . for injury to human beings by [animals *mansuetae naturae*] there is no liability, unless the animal was known by its owner or custodian to have previously acted so as to be a source of danger. When I say a source of danger, I do so advisedly instead of using such expressions as 'vicious' or 'mischievous'. It may well be that an owner who knew that his dog, although neither vicious or mischievous, was in the habit of rushing at and after carriages and cyclists, would be liable if an accident occurred, directly or indirectly, through the action of a dog with such known habits."[8]

Finally, there is some doubt as to whether behaviour, if it is to qualify as harmful, should be in some sense contrary to the nature of the animal. This is

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[1] *Parkhill* v. *Duguid* (1900) 16 Sh. Ct. Rep. 366; *Allan* v. *Reekie* (1906) 22 Sh. Ct. Rep. 57; *Peden* v. *Charleton* (1906) 22 Sh. Ct. Rep. 91; *Turner* v. *Simpson* (1913) 29 Sh. Ct. Rep. 81; *Paterson* v. *Howitt* (1913) 29 Sh. Ct. Rep. 216.

[2] This depends on the effect in Scotland of the English case of *McQuaker* v. *Goddard* [1940] 1 K.B. 687.

[3] *Nicol* v. *Summers* (1921) 37 Sh. Ct. Rep. 77.

[4] D. M. Walker, *The Law of Delict in Scotland* (1981), p. 637.

[5] *Glanville* v. *Sutton* [1928] 1 K.B. 571; *Jenkins* v. *Turner* (1696) 1 Ld. Raym. 109; *Gething* v. *Morgan* (1857) Saund. & M. 192.

[6] G. L. Williams, *Liability for Animals* (1939), pp. 301–302 and cases cited.

[7] *Fitzgerald* v. *ED and AD Cooke Bourne (Farms) Limited* [1964] 1 Q.B. 249—which may or may not have effect in Scotland.

[8] *Milligan* v. *Henderson* 1915 S.C. 1030, *per* Lord Guthrie at p. 1046.

a condition which is stated in some of the early Scottish authorities.[1] It has also appeared in recent case-law, where, for example, a bull's instinctive mating behaviour was regarded as not vicious for the purpose of classifying the animal as *ferae naturae,* though the behaviour actually resulted in harm.[2] However, this approach is not always taken, and the whole matter is rather unclear.[3]

2.8 Knowledge too is problematic. What is required for strict liability under the *scienter* rule is actual knowledge of some manifestation of the relevant harmful propensity on at least one previous occasion, whether the knowledge is acquired directly or indirectly.[4] However, evidence has also been admitted of vice displayed after the occasion of harm, as indicating "that the act complained of was not an isolated incident, such as may happen once in a lifetime of a well-behaved [animal], but that the [animal] was disposed to be vicious".[5] This approach is not obviously compatible with the one occasion rule, or, indeed, with the general tendency to require very little by way of evidence of knowledge.[6] There are also problems about indirect knowledge. In appropriate circumstances the knowledge of one person may be imputed to another, for example within a family.[7] But it is not clear how far the chain of indirect knowledge may extend, or whether the acquisition of knowledge at any intermediate stage is subject to conditions. For example, while it seems to be accepted that the knowledge of an employee can be imputed to his employer, it may be necessary that the employee has control over the animal, that is control relevant to the circumstances in which it causes harm, and also that his knowledge is direct personal knowledge of the alleged harmful propensity.[8] Such conditions pass readily into the view that liability should be imposed if the circumstances are such that the keeper of the animal should have known of the relevant propensity, whether or not he actually did know of it.[9] This perhaps reflects a tendency to assimilate liability under the *scienter* rule to liability based on fault, in the sense of negligence or failure to take reasonable care. As such, it may be considered as a particular manifestation of the general attitude towards strict liability which we referred to earlier.[10]

2.9 We have already mentioned that liability under the *scienter* rule is imposed primarily on the owner of an animal, though in certain circumstances, where the animal is not in the custody of its owner, the custodier may be liable.[11] There are problems in the application of this principle. First, it seems to be assumed in the leading case, *Cowan* v. *Dalziels,*[12] which states the tests for transferring liability from owner to custodier, that either the owner

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[1]Bankton, *An Institute of the Laws of Scotland* (1751–53), 1.10.4; Kames, *Principles of Equity* (1760, 1825), 1.1.2.

[2]*Dobbie* v. *Henderson* 1970 S.L.T. (Sh. Ct.) 27 at p. 29.

[3]See, for example, *Downs* v. *King* (1936) 52 Sh. Ct. Rep. 75. (A case actually founded on negligence but relevant for the approach adopted.)

[4]*M'Intyre* v. *Carmichael* (1870) 8 M.570.

[5]*Gordon* v. *Mackenzie* 1913 S.C. 109, *per* Lord Justice-Clerk Macdonald at p. 111.

[6]*Renwick* v. *Von Rotberg* (1875) 2 R.855.

[7]*Flockhart* v. *Ferrier* (1958) 74 Sh. Ct. Rep. 175.

[8]*Maclean* v. *The Forestry Commission* 1970 S.L.T. 265.

[9]See, for example, the statement in D. M. Walker, *The Law of Delict in Scotland* (1981) at p. 636.

[10]Paras. 1.17, 1.18 above.

[11]Para. 2.5.

[12](1877) 5 R.241.

or the custodier will be liable but not both. It is difficult to see what basis in principle this assumption has, and, certainly, in at least one important case decree was granted against owner and custodier jointly and severally without debate.[1] Second, the tests themselves are difficult to apply.

2.10 For example, it is said that before liability can be imposed on the custodier, the care of the animal must be committed to him for a length of time. This is presumably intended to exclude the custodier's liability where he is acting in the short-term simply on behalf of the owner. But in that sense the test seems to have been ignored.[2] Again, it is said that the transfer of custody must be for the custodier's benefit. This is reasonably clear in the circumstances of *Cowan* v. *Dalziels*. There, the owner derived no positive benefit from the transfer of custody and the custodiers were benefited by the continuous service of the animal (a watch-dog) while in their custody. However, custody may be transferred in many circumstances in which benefit accrues both to the owner and the custodier, or in which the custodier's benefit is not derived directly from the service of the animal. For example, custody may be transferred to a veterinary surgeon for treatment, or to a carrier for conveyance,[3] or to an auctioneer for sale,[4] and so on. It is far from clear how the test might apply in these various circumstances. Next, it is said that the custodier should be trustworthy. This appears more properly to raise questions as to whether the owner has exercised reasonable care in transferring custody of the animal.[5] The last test, which requires that the custodier should be fully aware of the precautions necessary, presumably means that the custodier should have that knowledge of the animal's propensities which in the owner would found liability if it caused harm. It may be that the custodier could acquire the necessary knowledge from the owner;[6] or possibly he might acquire the knowledge for himself while the animal is in his custody, or be deemed by law to have the necessary knowledge in the case of an animal *ferae naturae*. There is no general guidance in the case-law on this, although, in one case, the knowledge of an owner was imputed to a custodier.[7]

2.11 Another problem area is that of defences. The main defences available are clear.[8] However, there are two controversial defences which may or may not be available. First, there is a suggestion in *Burton* v. *Moorhead,*[9] where the pursuer was bitten by a watch-dog while he was on the defender's private property, that had the pursuer clearly had no right to be where he was, compensation would not have been recoverable. However, if such a defence is available it seems that it would only be available in very limited circumstances:

> "The question, however, remains whether the defender is responsible for the injury done to the pursuer by the dog, the pursuer being in the

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[1] *Fleeming* v. *Orr* (1855) 2 Macq. 14; (1853) 15 D.486.
[2] *Flockhart* v. *Ferrier* (1958) 74 Sh. Ct. Rep. 175.
[3] *Gray* v. *North British Railway Co.* (1890) 18 R.76.
[4] *Renwick* v. *Von Rotberg* (1875) 2 R.855.
[5] Cf. *Brown* v. *Fulton* (1881) 9 R.36.
[6] Cf. *Wilson* v. *Wordie & Company* (1905) 7 F.927.
[7] *Flockhart* v. *Ferrier* (1958) 74 Sh. Ct. Rep. 175.
[8] See para. 2.3.
[9] (1881) 8 R.892.

vicinity of the defender's farm, not in the exercise of any right, but as a mere passer-by. It is strongly contended for the defender that a 'trespasser' is not entitled to any reparation. I am not able to concur entirely in that argument. No doubt if a person were on premises for a distinctly unlawful purpose it might very well be maintained that he is not entitled to any damages for anything that may happen to him. The circumstances here, however, do not disclose such a case. The pursuer was walking along a road which passes through or nearby the defender's farm steading, not certainly in the exercise of any right, but in accordance with a custom of passage which had been tolerated by the defender and his predecessors in the occupancy of the farm for many years."[1]

Second, under Scots law, rights of property in non-domesticated animals generally subsist only so long as the animals are confined or retain the habit of returning home after straying.[2] If such an animal escapes, or is abandoned, and then causes harm when it has reverted, as it were, to the wild state, there may be no owner or custodier on whom to impose liability. There is some authority for the existence of such a defence in England before the passing of the Animals Act 1971, but the position in Scotland is quite unresolved.[3]

2.12 Finally, there is a problem concerning causation. It seems that, where liability may be imposed for harm directly caused by the behaviour of an animal, there may also be liability if that behaviour causes harm indirectly.[4] Indeed, if liability under the *scienter* rule is established in respect of some harm, liability may extend to all harm caused, however remote. In the case of *Cameron* v. *Hamilton's Auction Marts Ltd.*,[5] for example, an action founding on the *scienter* rule was held competent against a farmer who owned a cow which ran away while in the custody of auctioneers, although the damage caused was considered too remote for the purposes of founding an action in negligence against the auctioneers. It is far from clear, therefore, what the test for remoteness of damage is in the case of liability under the *scienter* rule, or, indeed, whether there is any such test.

Winter Herding Act 1686

2.13 At common law, there was a very ancient remedy whereby livestock trespassing while the crops were in the ground might be detained *brevi manu* for 24 hours and then sold, unless compensation was paid or pledged as fixed by local apprisers.[6] The Winter Herding Act 1686 is generally regarded as having been enacted to extend and strengthen that earlier remedy by making the obligation to herd effective throughout the year. The Act provides:

". . . all heretors liferenters tenents cotters and other possessors of lands or houses shall cause herd their horses nolt [cattle] sheep suyne and goats

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[1] *Bell* v. *Taylor* (1914) 30 Sh. Ct. Rep. 39 at p. 40.

[2] J. Rankine, *The Law of Land Ownership in Scotland* (4th ed., 1909), pp. 145–147.

[3] For the position pre-1971 in England and Wales see G. L. Williams, *Liability for Animals* (1939), pp. 336–339.

[4] *Fraser* v. *Bell* (1887) 14 R.811; *M'Donald* v. *Smellie* (1903) 5 F.955; *Milligan* v. *Henderson* 1915 S.C. 1030, *per* Lord Guthrie at p. 1046 (quoted at para. 2.7).

[5] 1955 S.L.T. (Sh. Ct.) 74.

[6] Erskine, *An Institute of the Law of Scotland* (1773), III.vi.28; Bankton, *An Institute of the Laws of Scotland* (1751–53), IV.41.16.

the wholl year alse weell in winter as in summer and in the night tyme shall cause keep the same in houses folds or enclosures soe as they may not eat or destroy their nighboures ground woods hedges or planting certifieing such as contraveen they shall be lyable to pay halfe a merk [about 3p] toties quoties for ilke beast they shall have goeing on their neighboures ground by and attour [over and above, as well as] the damnage done to the grass or planting . . ."

The Act has been interpreted as allowing a claim for damages (irrespective of penalties etc.) for actual damage done.[1] The fundamental principle is that possessors of land should herd their livestock on the land they possess. Liability has accordingly been imposed on a variety of possessors of land, for example, a common grazier, a seasonal grazing tenant and even a sub-tenant hiring the right of grazing from a tenant by the day or week.[2] Similarly, almost anyone having lawful possession of land is entitled to invoke the protection of the Act. For example, it was sufficient in one case that the party claiming compensation had purchased the crop which was damaged, although he had possession of the ground only for the temporary purpose of harvesting and removing the crop.[3] There is no requirement that "nighboures ground" should be coterminous with or adjacent to the ground from which the trespassing animals have strayed.[4]

2.14 The Act also provides for the detention of straying animals and the recovery of the expenses of keeping them while detained:

". . . it shall be laufull to the heretor or possessor of the ground to detaine the said beasts untill he be payed of the said halfe merk for ilke beast found upon his ground and of his expenses in keeping of the same . . ."

This provision has two aspects. It sanctions what is in effect self-help, as a means of preventing or restricting damage. It also makes available a means of enforcing payment of what is due under the Act. The process of detention is subject to a number of conditions. Only animals actually on the detainer's ground may be detained, though once lawfully detained they may be followed and recaptured if they escape.[5] There is apparently no requirement to give notice of the detention to the owner of the animals, but they must have access to water and fodder while detained and cannot be used by the detainer.[6] Conditions other than payment of what is due under the Act cannot be imposed on their release.[7] A right to sell detained animals, on a prior warrant of the court, has been read into the Act, largely as a result of the view taken of its historical origins, though no such right is mentioned expressly in the text.[8]

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[1] *Brown and Another* v. *Lord Advocate* 1973 S.L.T. 205.

[2] *Malcolmson* v. *Bruce* (1892) 8 Sh. Ct. Rep. 338; *Hill* v. *Burnett* (1954) 70 Sh. Ct. Rep. 328; *Murphy* v. *Beckett* (1920) 36 Sh. Ct. Rep. 38.

[3] *Murphy* v. *Beckett* (1920) 36 Sh. Ct. Rep. 38.

[4] *Murphy* v. *Beckett* (1920) 36 Sh. Ct. Rep. 38 at p. 40; *Gordon* v. *Grant* (1870) in Guthrie, *Select Cases etc.* (1879), p. 575; *Farquharson* v. *Walker* 1977 S.L.T. (Sh. Ct.) 22.

[5] *M'Arthur* v. *Jones* (1878) 6 R.41.

[6] *Shaw and Mackenzie* v. *Ewart* March 2 1809, Faculty Decisions; *Mitchell & Sons* v. *McMillan* (1909) 25 Sh. Ct. Rep. 240; *Duncan* v. *Kids* (1676) Mor. 10514.

[7] *Fraser* v. *Smith* (1899) 1 F.487.

[8] Para. 2.13; J. Rankine, *The Law of Land Ownership in Scotland* (1909), p. 612.

Criticisms of the Winter Herding Act 1686

2.15 So much as has been stated seems clear. Almost everything else about the Act is problematic. Much of the obscurity can be attributed to its archaic language and structure which give rise to a number of technical difficulties. For example, the preamble, which narrates the reason for enactment, refers in general terms to the "not herding of nolt sheep and other bestial". "Bestial" is a collective term for any livestock on the farm, or in older Scots for domestic animals and animals in general.[1] However, the body of the Act requires the herding of only a small number of specified animals, namely, horses, nolt, sheep, suyne and goats. There is a tradition that the Act should be interpreted narrowly as being a penal statute.[2] On that view, the obligation to herd would not extend beyond the specified animals. However, more recently there has been some reluctance to rest any inference as to interpretation on the suggested penal nature of the Act.[3]

2.16 Again, there is a connected doubt as to whether the recovery of the statutory penalties is subject to special conditions. It has been held that proceedings for the recovery of penalties under the Act were subject to the provisions of the Summary Jurisdiction (Scotland) Acts 1864 to 1881. The effect of this was that proceedings could not be brought in the then existing small debt court, and, more importantly, could only be brought within a period of six months after the contravention in respect of which the penalties were due.[4] The general scheme for the recovery of statutory penalties under the 1864 and 1881 Acts was continued in subsequent legislation. From the beginning, the forms provided by the various Acts do not seem to have been regarded as necessary, but it is arguable that the time limit of six months for proceedings still applies.[5] There is no discussion of this point specifically in recent cases. Indeed, in the most recent of these the view is expressed that the provision for recovery of penalties is out of date and that questions of penalties generally have passed away during the last 100 years.[6] If that is so, the residual obscurities affecting penalties may be of little practical significance.

2.17 More important, there is substantial uncertainty about which defences are available. In the most recent discussions of the nature of the liability involved, there are references without distinction to "absolute obligation", "absolute liability", "strict liability", "liability without fault" and "liability without proof of fault."[7] Certainly, it is not sufficient in itself that someone is employed to herd the offending animals; what is required is such herding as prevents straying.[8] Moreover, liability is not excluded or diminished by a complainer's failure to erect or maintain a fence or barrier against trespassing

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[1] *The Scottish National Dictionary.*

[2] *M'Arthur* v. *Jones* (1878) 6 R.41; *Cameron* v. *Miller* (1907) 23 Sh. Ct. Rep. 318 at p. 319.

[3] *Brown and Another* v. *Lord Advocate* 1973 S.L.T. 205, *per* Lord Grieve at pp. 207–208; see also at p. 210.

[4] *Grant* v. *Hay* (1888) 2 White 6; *Grewer* v. *Wright* (1883) in Guthrie, *Select Cases etc.* (1894), p. 412.

[5] D. M. Walker, *The Law of Delict in Scotland* (1981), p. 941.

[6] *Farquharson* v. *Walker* 1977 S.L.T. (Sh. Ct.) 22, at pp. 22–23.

[7] *Brown and Another* v. *Lord Advocate* 1973 S.L.T. 205; *Farquharson* v. *Walker* 1977 S.L.T. (Sh. Ct.) 22.

[8] *Turnbull* v. *Couts* February 23 1809, Faculty Decisions; *Shaw and Mackenzie* v. *Ewart* March 2 1809, Faculty Decisions.

stock.[1] From this it may be inferred that the defence of contributory negligence is at least curtailed, if not wholly excluded. It has also been said that it is immaterial that animals may have escaped by the malicious act of a third party.[2] The other defences which are usually available in cases of strict liability, unavoidable accident and voluntary assumption of risk, do not appear to have been directly raised, and it is not clear whether they would be available.

2.18 Another defence, unique to the Act, may or may not be available, namely, that land which is not planted is excluded from protection under the Act. This seems to be the main ground of decision in the sheriff court case of *Gordon* v. *Grant.*[3] However, that decision is not altogether consistent with an earlier case in the Court of Session, *Pringle* v. *M'Rae,*[4] in which the Act was applied to a highland sheep-farm, although it was expressly recognised that there were no plantings, enclosures, sown grass or crops on the farm. The better view is probably that ground need not be planted to be protected under the Act, at least if it serves some such minimal purpose as rough grazing, for example. This would perhaps also be more consistent with the view, for which there is also some authority, that actual damage is not a prerequisite of liability, so that the statutory penalties may be separately recovered merely on proof of straying.[5]

2.19 Finally, there is a problem about detention under the Act. Detention is expressly authorised only in respect of the fixed penalties and the expenses of keeping the detained animals. The Act has been applied to the recovery of compensation for actual damage, and this suggests that the remedy of detention should also be available in such a case. This was certainly the view of the early Scottish authorities.[6] But it has also been held in certain cases, in which the question of damages did not arise, that continued detention was unlawful after tender of payment of penalties and expenses.[7] If, in fact, detention for damages is not available, the usefulness of the Act may be diminished, though, in practice, it may not matter whether animals have been detained as a preliminary to claiming damages, as opposed to penalties, since detained animals can only be sold on the warrant of the court. If a claim for damages can be made out before the court, it is perhaps unlikely that the niceties of detention would be debated. However, if there is a real possibility that a counter-claim for loss arising from improper detention might be available to the owner who has tendered payment of penalties and expenses, then the decision not to release detained animals may be problematic. An alternative procedure may be for the owner of the animals to pay the disputed damages under protest to secure their release and subsequently seek the court's aid to fix the sum really due. This procedure has been judicially commended in the case of disputed expenses, but would be unattractive when a claim for damages is large.[8]

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[1] *Loch* v. *Tweedie* July 3 1799, Faculty Decisions; Mor. 10501; *M'Arthur* v. *Miller* (1873) 1 R.248.

[2] *Murphy* v. *Beckett* (1920) 36 Sh. Ct. Rep. 38 at p. 39.

[3] (1870) in Guthrie, *Select Cases etc.* (1879) p. 575.

[4] 31 Jan. 1829, Faculty Decisions; (1829) 7 S.352.

[5] *Leith* v. *Ross* (1895) 11 Sh. Ct. Rep. 110.

[6] Erskine, *An Institute of the Law of Scotland* (1773), III.vi.28.

[7] *Fraser* v. *Smith* (1899) 1 F.487; *M'Arthur* v. *Miller* (1873) 1 R.248.

[8] *Malcolmson* v. *Bruce* (1892) 8 Sh. Ct. Rep. 338 at p. 346.

Dogs Acts 1906 to 1928

2.20 The Dogs Act 1906, as amended by the Dogs (Amendment) Act 1928 provides:

> "1(1) The owner of a dog shall be liable in damages for injury done to any cattle or poultry by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such a previous propensity, or to show that the injury was attributable to neglect on the part of the owner."

The provision takes this form for historical reasons, and a brief examination of these may help to clarify the nature of the liability involved. The current provision replaces an earlier enactment, the Dogs (Scotland) Act 1863, which was in rather similar terms:

> "1 In any Action brought against the Owner of a Dog for Damages in consequence of Injury done by such a Dog to any Sheep or Cattle, it shall not be necessary for the pursuer to prove a previous Propensity in such a dog to injure Sheep or Cattle."

That provision was intended to abrogate the effect of the case of *Fleeming* v. *Orr*[1] which was then thought to have laid down the rule that liability in relation to a dog injuring livestock could only be founded on the owner's proven knowledge of a previous propensity in the dog to behave in that way. Subsequently, the provision was criticised on the ground that it had left it uncertain whether or not some fault on the part of the owner was a prerequisite of liability.[2] The 1906 Act, accordingly, reiterates the exclusion of the assumed requirement to show mischievous propensity and knowledge and expressly excludes in addition any requirement to show neglect (fault or negligence) on the part of the owner. That is, liability under the Acts is strict, if not absolute.

2.21 The reference to "injury done" in section 1(1) of the 1906 Act may seem to imply the actual infliction of physical injury by the dog, and, indeed, this restrictive interpretation is adopted in an early case under the 1863 Act.[3] However, indirect injury now seems to be sufficient, for example, if an animal injures itself while trying to escape from a feared or actual attack.[4] The expression "cattle" as used in the Act includes horses, mules, asses, goats and swine (section 7). "Poultry" is defined by reference to the Poultry Act 1911, where it means domestic fowls, turkeys, geese, ducks, guinea-fowls and pigeons.

2.22 Under the Acts it is the owner of the dog who is liable to pay compensation for injury done, but there are provisions which operate to identify the owner presumptively where his identity may be in doubt:

> "1(2) Where any such injury has been done by a dog, the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at that time:

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[1](1855) 2 Macq. 14.
[2]*M'Intyre* v. *Carmichael* (1870) 8 M.570, *per* Lord President Inglis at p. 574.
[3]*Young* v. *Cameron* (1889) 5 Sh. Ct. Rep. 292.
[4]*Belford* v. *Reid and Ogilvie* (1912) 28 Sh. Ct. Rep. 12.

> Provided that where there are more occupiers than one in any house or premises let in separate apartments, or lodgings, or otherwise, the occupier of that particular part of the house or premises in which the dog has been kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog."

For the presumptive owner to exclude liability it is sufficient if he proves that he is not in fact the owner of the dog at the relevant time. The actual owner, if known, will then be liable. This contrasts with the previous law where the presumptive owner, similarly defined, had to prove not only that he was not the owner of the dog but also that the dog was kept on his premises without his sanction or knowledge.[1] It is not clear what other defences, if any, may be available. Where two or more dogs, acting together, cause injury, their respective owners are jointly and severally liable for the whole amount of the compensation to be paid.[2]

Criticisms of the Dogs Acts 1906 to 1928

2.23 A major problem with the Acts, as mentioned, is the question of defences, on which there is very little by way of Scottish authority. However, there are English and Irish cases which suggest that the defences of voluntary assumption of risk and contributory negligence may be available.[3] The defence of intervention of a third party may also be available. This at last seems to be the import of the sheriff's remarks in the case of *Belford* v. *Reid and Ogilvie*[4] where both defenders were held liable under the Acts, although Ogilvie was out by himself with his and Reid's dogs. In the course of his judgment the sheriff said:

> "The difficulty lies in determining . . . whether Ogilvie had not, by taking or going off with Reid's dog, assumed the liabilities of owner to the exclusion of Reid. I admit the case is a hard one, but I can find no reason to relieve Reid of responsibility. I think the result would have been different if Ogilvie had taken Reid's dog from a shut place or from a chain, but in the present circumstances there is nothing to show that Reid had taken any precautions to prevent his dog straying and getting into mischief . . ."

2.24 The definition of "poultry" for the purposes of the Act is also problematic. The definition in the Poultry Act 1911 has been repealed and re-enacted in a succession of subsequent Acts and in its current form, in section 87(4) and (5) of the Animal Health Act 1981, it is much wider. It includes specifically pheasants and partridges in addition to the species mentioned in the 1911 Act and may be extended or restricted by subordinate legislation. According to the usual principles of interpretation, statutory references to provisions which have been re-enacted are to be taken as

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[1] Dogs (Scotland) Act 1863, section 2. See *Murray* v. *Brown and Porteous* (1881) 19 S.L.R. 253; *Jackson* v. *Drysdale and Craig* (1896) 12 Sh. Ct. Rep. 224.

[2] *Arneil* v. *Paterson* 1931 S.C. (H.L.) 117.

[3] *Elliot* v. *Longden* (1901) 17 T.L.R. 648; *Campbell* v. *Wilkinson* (1909) 43 I.L.T. 237; *Grange* v. *Silcock* (1897) 77 L.T. 340. In other jurisdictions with similar legislation, it has been argued that all the usual defences in case of strict liability applied—see P. M. North, *The Modern Law of Animals* (1972), p. 193 and cases cited in footnote 12.

[4] (1912) 28 Sh. Ct. Rep. 12 at p. 13.

references to the re-enacted forms unless the contrary intention appears.[1] It is fairly clear that extensions to the definition effected by subordinate legislation will not apply for the purposes of the Dogs Acts, since the power to make the subordinate legislation is expressed as being only for the purposes of the Act in which the power is conferred. This would seem to be sufficient indication of the contrary intention required. Arguably, in the case of pheasants and partridges too, the contrary intention appears. The extension is specifically made in the context of diseases of animals which is remote from that of harassment of livestock by dogs. Principles which are applicable to domestic fowls are not obviously appropriate to game-birds. However, the Animal Health Act 1981, section 13(2), does contain provisions relating to the worrying of animals (livestock, not poultry) by dogs, and pheasants and partridges reared and kept in captivity until killed for the table may conceivably be poultry.[2] So the issue is not altogether clear.

Conclusion

2.25 As a result of our consideration of the existing rules of strict liability, we must conclude that reform is necessary, if only to restate these rules more clearly. In Part III we will consider whether more is required, and, if so, what principles should guide reform.

[1] Interpretation Act 1889, s.38(1); Interpretation Act 1978, s.17(2).

[2] *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association* [1969] 2 A.C. 31, esp. at p. 85.

PART III PRINCIPLES OF REFORM

Some approaches to reform

3.1 What is most characteristic of our present law is the existence of a multiplicity of bases of liability, namely, fault, discussed in Part I, and the three grounds of strict liability discussed in Part II. These, though distinct, are not mutually exclusive. An action can often be founded on one or other, in the alternative, and the tactics of litigation as much as principle may determine the choice. A like multiplicity was, or is, a feature in a number of other jurisdictions where this branch of the law has been considered by law reform bodies, that is in England and Wales, Ireland, several of the Australian states, and New Zealand.[1] The law in these jurisdictions is of common origin. There are therefore many similarities between the several systems and between them and Scots law which has been so influenced by English law in this area. The legal systems of continental Europe, on the other hand, generally contain uniform rules of strict liability for all animals which are in keeping or use.[2] A variant rule in Switzerland imposes liability on the keeper of an animal causing harm unless he can prove that he took all care required in the circumstances, or that such care would not have prevented the harm which occurred.[3]

3.2 The general trend of reform, with just one or two exceptions, has been towards simplification, in the sense of reducing the number of bases of liability. We have considered four main options for reform:

(1) Restating and clarifying the existing law with a view to eradicating anomalies with the minimum amount of change.

(2) Abolishing the special rules of strict liability and allowing liability for all injury and damage by animals to rest on the general principles of fault as established in the present law.

(3) Imposing strict liability, in an appropriate form, for all injury and damage by animals, without exception.

(4) Introducing a new form of strict liability for exceptional or special risks which are widely recognised in relation to certain kinds of animals, with liability otherwise based on the existing general principles of fault.

3.3 These same options, in various forms and different combinations, figure prominently in the recent reports of the numerous law reform bodies which have examined liability in relation to animals. For example, the option chosen

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[1]The Law Commission, "Civil Liability for Animals", (1967) Law Com. No. 13; Law Reform Committee of South Australia, "Law Relating to Animals", (1969) Seventh Report; Law Reform Commission of New South Wales, "Civil Liability for Animals", (1970) Report, LRC 8; Torts and General Law Reform Committee of New Zealand, "The Law Relating to Liability for Animals", (1975) Report; The Law Reform Commission of Queensland, "Working Paper on a Bill to Remove the Anomalies Presently Existing, with respect to Civil Liability for Animals etc.", (1977) QLRC, W.18; The Law Reform Commission of Ireland, "Civil Liability for Animals", (1977) Working Paper No. 3, (1982) Report, LRC 2.

[2]Articles 1385 of the French Civil Code, 2052 of the Italian Civil Code, 833 of the German Civil Code, 1404 of the Netherlands Civil Code (replaced in effect by article 6.3.11 of the Draft Civil Code (1977)). In the German Civil Code there is a derogation from the regime of strict liability where an animal is used for the profession, business or maintenance of the keeper.

[3]Article 56 of the Code of Obligations.

by the Law Commission for England and Wales, and subsequently implemented in the Animals Act 1971, was in effect to restate and clarify their existing rules with the minimum of change.[1] The Law Reform Commission of New South Wales, on the other hand, were much attracted by option (2), that is applying the general principles of fault universally to all injury and damage by animals. Ultimately, however, they felt compelled to retain strict liability rules exceptionally for injury by dogs.[2] The approach of the Law Reform Committee for Scotland in 1963 was similar, although again certain exceptions were recognised where strict liability was considered appropriate—broadly, the existing exceptions embodied in the Winter Herding Act 1686 and the Dogs Acts 1906 to 1928.[3]

3.4 Option (3), imposing a universal form of strict liability for all injury and damage by animals, has not been popular. This is the most radical approach to reform for legal systems such as ours, and would represent a shift towards the continental jurisdictions. Of those bodies whose reports we have studied, only the Law Reform Commission of Ireland adopted this approach, but there are indications that their recommendations in this respect are unlikely to be implemented.[4]

3.5 Our preference is for option (4), a new form of strict liability for special risks, with liability otherwise based on the existing general principles of fault. In the remainder of this part we explain why this is our preference, and what we think are the principles which should guide reform.

The case for a single basis of liability

3.6 Options (2) and (3) have in common the premise that actions of damages for harm caused by animals should rest on a single basis of liability. This is an initially attractive proposition, since it seems to represent the maximum of simplification. However, it is not obvious which of the suggested principles should be adopted as the primary basis of liability. The main choice seems to lie between fault and a principle of strict liability modelled perhaps on the provisions of the European Civil Codes. The traditional view in this country has certainly been that strict liability should only be imposed exceptionally after careful consideration of the risk involved.[5] But recently the Law Reform Commission of Ireland, criticising the attempt to reintegrate the rules of liability for animals into the ordinary rules of liability, concluded that modern trends in the law of torts (law of delict in Scotland) tended to favour principles of strict liability.[6]

3.7 It is not immediately clear why there should be this division of opinion. The main practical disadvantages of strict liability seem to be a possible loss of flexibility in the decisions of the courts, and perhaps also an increase in the

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[1](1967) Report, Law Com. No. 13.

[2](1970) Report, LRC 8; Animals Act 1977 (Act No. 25, 1977) and Dog (Amendment) Act 1977 (Act No. 27, 1977).

[3]Twelfth Report, Cmnd. 2185 (1963).

[4](1982) Report, LRC 2; Animals Act 1985.

[5]See, for example, (1967) Report, Law Com. No. 13, para. 14; Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054 (1978), Vol. I, paras. 312–319, pp. 74–75.

[6](1977) Working Paper No. 3, para. 136, citing the then Draft E.E.C. Directive on Products Liability, no-fault automobile insurance schemes in the U.S.A. and Canada and the New Zealand Accident Compensation Act 1972.

costs of liability insurance, although we have not been able to obtain confirmation of this from insurers. On the other side might be set possible advantages in reducing litigation or facilitating the process of litigation, though these too are difficult to quantify. But most probably the conflicting views of strict liability reflect different views as to how far legal liability should coincide with moral culpability. This is a persistent issue in the law of civil liability with its vocabulary of terms, such as fault and reasonableness, which have moral connotations. In that form the issue probably has no clear resolution, but it does perhaps suggest that the question of who should be liable is a crucial one, where the reasons for imposing liability on one person rather than another of several possible defenders are evenly balanced. To that extent there may be a slight presumption in favour of the traditional view which is generally against imposing liability without fault.

3.8 Support for a norm of strict liability tends to rest on a particular view of the social purposes of liability rules which has emerged in recent years. According to this view, the compensation system operates essentially to allocate risk and redistribute loss.[1] That is, it may be argued that loss should be borne by whoever, in pursuit of permissible benefit, creates the risk of that loss. It is also part of this view that the primary aims of the system are certainty and speed, and rules of strict liability are thought to further these aims as well. Applied to the case of animals, the principle of allocating risk implies that the keeping of animals, as such, should be regarded as constituting a special risk, so that keepers who are benefited should bear the cost of repairing the harm which their animals cause. This is buttressed by an economic-welfare argument in favour of redistributing loss. It may be argued, for example in the case of livestock, that any loss caused by such animals should be regarded as part of the livestock producer's costs. For this loss will be covered by liability insurance, the cost of which will be redistributed via premium rates among all livestock producers and ultimately among the more numerous consumers who meet their costs generally. A variant of this argument will apply in the case of the non-economic animals, so that the keeper of such an animal, who is presumed to benefit from it, may be regarded as the person best placed to control it and insure against the risk of injury or loss which it represents. Again, loss will be redistributed to some extent via insurance premiums. This is an attractive argument, and, indeed, in its general form it is a principal motivation in the current concern with compulsory insurance and no-fault compensation which we consider briefly in Part V. But this view cannot be adopted at the outset, since it would pre-suppose precisely what may be lacking, namely, a consensus that in fact the keeping of animals, as such, should be regarded as constituting a special risk.

3.9 Given this background of debate, the response of our commentators is particularly significant, since it is our main guide to the prevailing attitudes towards keeping animals. We did consider carrying out a separate attitude survey in this exercise, but decided against it, partly on the ground of expense, but mainly because we took the view that there were in fact many organised interest groups concerned with this area of the law which we could approach in direct consultation. In our consultative documents we canvassed the main options for reform, in particular those concerned with adopting a

[1] See, for example, Law Reform Commission of Ireland, (1977) Working Paper No. 3, para. 137.

single basis of liability, whether fault or some appropriate form of strict liability. We also considered the possibility of adopting a principle of what we called "presumed liability" modelled on the provision contained in Article 56 of the Swiss Code of Obligations.[1] In essence, this amounts to adopting fault as the basis of liability, but imposing a reversal of the burden of proof, either generally or in particular cases, so that a defender is liable unless he can show that he took reasonable care in the circumstances.

3.10 Our justification for considering "presumed liability" is this. Our law at present already recognises a principle *(res ipsa loquitur)* whereby, in certain circumstances, proof of the occurrence of the event which caused harm may be regarded as establishing a *prima facie* case of negligence, or failure to take reasonable care, against the defender. It then falls to the defender to show that the event can be reasonably explained without reference to negligence on his part, or alternatively that he took all reasonable and proper precautions in the circumstances. The principle has been considered, for example, in relation to horses bolting and causing injury to members of the public, where no very clear explanation of the horse's behaviour was available.[2] But, in the case of horses, natural waywardness falling short of that degree of spiritedness or restiveness which, if known, might found liability under the *scienter* rule may be sufficient explanation to counter the presumption of negligence.[3] On the other hand, that same waywardness may have implications for the standard of precautions required, and in no case is the court relieved from the necessity of considering the bearing of evidence actually available on such issues.[4] Generally, the principle will only apply in the absence of explanation; where the harm is such as does not ordinarily happen; and where it happens in circumstances over which the defender alone has control.[5] In this form it is clearly of rather of restricted scope. However, the possibility of adopting an extended form of such a principle has been discussed in terms of founding liability on negligence (fault) but imposing a general reversal of the burden of proof.[6] On this view, it is a significant modification of the principle of liability based on personal fault, and merits separate consideration. A solution of this sort has also been proposed for certain problems in other jurisdictions.[7]

3.11 Unfortunately, the results of our consultation on the issue of adopting a single basis of liability were rather less conclusive than we would have hoped. The issue was addressed directly by just over half our commentators, although this did include most of the major representative bodies. Among those considering the issue, there was no very clear preference for one principle rather than another, and, indeed, a number of influential commen-

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[1] See para. 3.1.

[2] *Snee* v. *Durkie* (1903) 6 F.42; *Hendry* v. *M'Dougall* 1923 S.C.378.

[3] *Ballantyne* v. *Hamilton* 1938 S.L.T. 219, *per* Lord Robertson at p. 221.

[4] *Ballantyne* v. *Hamilton* 1938 S.L.T. 468, *per* Lord Moncrieff at p. 481 (reversing the decision of Lord Robertson).

[5] *Colvilles Ltd.* v. *Devine* [1969] 2 A.E.R. 53.

[6] Report of the Committee on the Law of Civil Liability for Damage Done by Animals, Cmnd. 8746 (1953), para. 6; Law Commission, (1967) Report, Law Com. No. 13, paras. 27–28; Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd.7054 (1978), Vol. I, paras. 313, 314, p. 75.

[7] Law Reform Commission of New South Wales (1970) Report, LRC 8, para. 27; Torts and General Law Reform Committee of New Zealand, (1975) Report, p. 52.

tators altogether rejected the idea that there should be only a single basis of liability. Generally, however, the legal bodies and animal welfare groups gave some support to a system based on fault, with or without a reversal of the burden of proof. There was no significant support for a universal principle of strict liability. In fact, what probably emerged most clearly from the consultation was that the traditional mixed system remains broadly acceptable. Certainly, there is no evidence that keeping animals, as such, is regarded as a special risk warranting strict liability whenever, or whatever, harm is caused. Conversely, there are strongly held views that particular kinds of animals do present special risks for which strict liability is appropriate.

3.12 A point made to us forcefully by certain commentators was that, given the great variety of rules from jurisdiction to jurisdiction, no one set of rules had any obviously greater merit than any other. So, it was said, the solutions to the problems with which we are concerned in this exercise should proceed on the basis of consensus amongst those most involved with animals and should not be based on some apparently convenient principles with which the public would disagree. We accept this proposition, and our first and most general conclusion is that fault should remain a ground of liability for animals. Certain exceptions, which we will go on to discuss, should probably be recognised, where strict liability should be imposed. In short, we reject options (2) and (3) set out in paragraph 3.2 above.

3.13 As an alternative to strict liability, it would of course be possible to adopt fault as the general basis of liability and impose a reversal of the burden of proof in the case of such exceptions as are recognised. But we do not favour this. We accept, as some have argued, that the facts and circumstances of injury or damage by an animal may sometimes be better known to its keeper than its victim, who consequently may be unable to have the merits of his claim adjudicated. However, this difficulty is not unique to claims brought in respect of injury or damage by animals; nor does shifting the burden of proof solve any of the problems of interpreting the requirement of reasonable care in the circumstances. We therefore see no intrinsic merit in accepting fault as the appropriate basis of liability but changing the usual requirement that a claimant should prove his case. Obviously, a claimant will not be excluded from invoking the principle of *res ipsa loquitur* if the usual requirements are satisfied.[1] Finally, we also reject the more general argument, which is sometimes put forward, that fault with a reversed onus of proof is more appropriate because concern for the victim should be primary. In our view, such concern is more effectively expressed, where it is required, by imposing strict liability.

3.14 Accordingly, we **recommend:**

1. **Fault, in its present form, should remain a ground of liability for animals, subject to exceptional provision for recognised special risks. There should be no reversal of the burden of proof, either generally or exceptionally.**

   (Paragraphs 3.6–3.14)

2. **Strict liability, in an appropriate form, should be imposed in respect of such special risks as are recognised.**

   (Paragraphs 3.6–3.14)

[1] See para. 3.10.

In what follows we discuss the cases which should be recognised as special risks, and the form of strict liability which we think is appropriate.

Special risks

3.15 On some cases of special risk the results of our consultation are clear. Our commentators were all but unanimous that dogs, as a class, constitute a special risk, and that strict liability should be imposed for every form of injury or damage which they cause. Some reservations, however, were expressed about the communication of disease. A very substantial majority took a similar view of livestock, but there was less agreement about the categories of risk for which strict liability was thought appropriate. Finally, there was some demand that animals of known dangerous or harmful propensities, however defined, should be regarded as a special risk, but no clear consensus as to the provision which might be made.

Dogs

3.16 The view that strict liability should be imposed for injury or damage caused by dogs is widely shared. The Law Reform Committee for Scotland, for example, concluded that the provisions of the Dogs Acts 1906 to 1928 should continue to have effect,[1] and in all jurisdictions where this issue has been examined recently a measure of strict liability is imposed. The precise measure varies, but the worrying of livestock has been accepted everywhere as warranting strict liability. In some jurisdictions strict liability has also been imposed, or recommended, for attacks which result in injury to persons or animals generally.[2] The most comprehensive proposals are probably those of the Law Reform Commission of Ireland. The form of strict liability which they advocate would seem to cover all injury and damage by dogs, however caused, subject only to very limited defences, although these recommendations have only been implemented in part.[3]

3.17 The case for strict liability rests on a number of considerations. First, the physical attributes of dogs are commonly such as enable them to inflict serious bodily injury on persons and animals. Second, dogs are in fact responsible for a great deal of the injury and damage caused by animals.[4] Third, despite the recent efforts of many local authorities to introduce effective dog control and to encourage responsible dog ownership, the view still seems to be quite common that, broadly speaking, dogs can be allowed to roam unsupervised and that, in ordinary circumstances, the owner of a dog does not act unreasonably towards others in permitting it to do so. These attitudes greatly increase the risks associated with dogs, even if they are only held by a minority of those who keep dogs, since the dog population in this country is so large.[5] Apart from these considerations, dogs have always been subject to a variety of statutory controls enforced by criminal sanctions, which is again evidence that the risks are well recognised.[6]

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[1]Twelfth Report, Cmnd. 2185 (1963), para. 15.

[2]For example, in New South Wales—Dog (Amendment) Act 1977 (Act No. 27, 1977), s.2.

[3](1982) Report, LRC 2, para. 2.12; Animals Act 1985.

[4]Consultative Memorandum No. 55, Appendices III, IV, Tables 12–17.

[5](1976) Report of the Working Party on Dogs, para. 2.3.

[6]Dogs Act 1871 as amended by the Dogs Amendment Act 1938; Dogs (Protection of Livestock) Act 1953; Road Traffic Act 1972, s.31; Guard Dogs Act 1975; Animal Health Act 1981, s.13; Civic Government Act 1982, s.48.

3.18 Our view, therefore, is that the existing strict liability imposed where a dog worries livestock should certainly be retained, and for this purpose we assume that the defects of the existing rules discussed in Part II can be cured. Anything less would be unacceptable if the comments made to us on consultation are at all representative. We also think that it is anomalous to have liability in this form and not to extend it to cover attacks on persons and animals generally. If it is said against this that dogs are not likely to behave in this way, that is not what the evidence shows. On the other hand, if in fact it is only ill-trained or badly controlled dogs which offend, then the responsible keeper has no reason to fear this extension of liability. Apart from injury to persons and animals as a result of direct attack, liability should, we think, generally rest on fault. This is probably more conservative than the views of many of our commentators, but we will introduce some qualifications when we come to discuss the precise form which we think strict liability should take. For the present, therefore, we state a minimum requirement, and **recommend:**

3. The risk that dogs may attack and injure persons or animals should be recognised as a special risk for which strict liability, in an appropriate form, should be imposed.

(Paragraphs 3.16–3.18)

Livestock

3.19 The Law Reform Committee for Scotland thought that the Winter Herding Act 1686 continued to serve a useful purpose and should therefore be retained and modernised.[1] This is in accord with the views expressed to us on consultation, although we have no evidence that the Act is commonly used in practice. This may be because its implications are well understood and provide a basis for farmers and other land-users to settle claims without recourse to litigation. Certainly, this was the reason advanced by the Law Commission when they proposed to retain the corresponding remedy in England and Wales which is now embodied in sections 4 and 7 of the Animals Act 1971.[2] For our part, we do not think that the matter of injury and damage by livestock should be considered only in relation to the land-use community, but we do accept that a rule of strict liability would serve a useful purpose in that community where livestock, in the course of foraging, damage land or its produce, or other property on land, such as fences or buildings. For it does appear to be a well recognised risk that such animals will seek out food wherever they can. Accordingly, strict liability for that risk seems appropriate. It is a more difficult question, however, whether there are also other risks which would warrant imposing strict liability.

3.20 One problem which has received a great deal of attention recently is the problem of livestock straying in a public road or similar place. We considered this in some detail in our consultative memorandum.[3] Under the

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[1]Twelfth Report, Cmnd. 2185 (1963), para. 14.

[2](1967) Report, Law Com. No. 13, paras. 62–63.

[3]Paras. 5.9, 5.43–5.47. See also paras. 6.11–6.13 in which we discussed the possibility of introducing compulsory fencing of roads as a solution to the problem. There was wide agreement on consultation that this was impracticable, particularly in relation to the large areas of the country which are unfenced at present. We have accordingly not pursued this line of thought further.

present law it now appears to be established that the keeper of livestock owes a duty of care to users of the highway, in certain circumstances, not to allow his animals to stray there; and that fencing is a relevant factor when considering breach of duty, although there is no absolute duty as such to fence against straying.[1] Such a solution founded on fault (negligence) has been adopted, or recommended, in most jurisdictions where the problem has been examined.[2] The consensus, therefore, is probably that this is the just and fair solution, taking account of the respective interests of land-users and road-users. This was certainly the view of the Law Reform Committee for Scotland, and it accords with the views expressed to us on consultation.[3]

3.21 However, we did propose expressly in our consultative memorandum that this particular problem might be appropriately dealt with by adopting fault as the basis of liability, but reversing the burden of proof. This is a solution which has been recommended elsewhere.[4] The argument for it is that, in the ordinary case, the facts and circumstances of straying are more likely to be within the knowledge of the keeper of the straying animals than of the claimant who consequently may be unable to have the merits of his claim adjudicated. However, as we explained when discussing the case for a general reversal of the burden of proof in paragraph 3.13 above, we are not convinced by this argument. The difficulty is not unique to claims brought in respect of straying animals, and shifting the burden of proof does not solve the problem of interpreting the requirement of reasonable care. In any event, the solution did not seem to us to receive sufficient support on consultation to justify us in departing from our first view, which we have already expressed in Recommendation 1, that reversing the burden of proof in cases of fault is not an appropriate technique generally.[5]

3.22 Another solution to the problem, which we expressly canvassed, was that we should adopt fault as the basis of liability, but, in addition, should state statutory criteria for negligence. The essence of this approach would be to direct the court to consider a non-exhaustive list of relevant factors when deciding whether the appropriate standard of care has been met in any particular case. The purpose of this is that guidance is thereby provided in advance as to the standard of care expected. This approach is also precedented elsewhere, notably in England and Wales where it was recommended by the Law Commission, though not in fact implemented subsequently in the Animals Act 1971.[6] The list of factors we suggested was based on our examination of previous studies:

(a) the general nature of the locality;

(b) the nature and amount of traffic using the particular road;

(c) the common practice in the locality in relation to fencing;

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[1] *Sinclair* v. *Muir* 1933 S.N. 42, 62; *Colquhoun* v. *Hannah,* Court of Session, 28 January 1943 (unreported); *Wark* v. *Steel* 1946 S.L.T. (Sh. Ct.) 17; *Tierney* v. *Ritchie* (1960) 76 Sh. Ct. Rep. 57; *Gardiner* v. *Miller* 1967 S.L.T. 29.

[2] For example, in England and Wales, New South Wales, New Zealand, Queensland, Western Australia and Tasmania.

[3] Twelfth Report, Cmnd. 2185 (1963), para. 12.

[4] Law Reform Committee of South Australia, (1969) Seventh Report, paras. 3, 7; Torts and General Law Reform Committee of New Zealand, (1975) Report, pp. 46–52.

[5] Para. 3.14.

[6] (1967) Report, Law Com. No. 13, para. 57. See also, Law Reform Commission of Western Australia, (1981) Report on Liability for Stock Straying on to the Highway, paras. 6.13–6.15.

(d) the cost of fencing or taking other measures to prevent animals straying on to the road or to warn road-users of their likely presence;

(e) the extent to which road-users would expect to encounter animals on the particular road and could be expected to guard against the risk of their presence.

On consultation, however, there was no significant support for this solution. We are also opposed to it in principle. Accordingly, we merely record the solution as one which has been explored and rejected.

3.23 Another major risk associated particularly with livestock is the communication of disease to other animals, and in our consultative memorandum we considered specifically whether it would be appropriate to treat this as a special risk for which strict liability should be imposed.[1] Under the present law liability is generally based on fault, although, theoretically, liability might also arise under the *scienter* rule.[2] However, it seems to us that, in practice, disease has come to be dealt with almost exclusively under the separate statutory code now contained in the Animal Health Act 1981 and relative subordinate legislation. This code provides for the separation and slaughter of infected animals and for compensation to be paid from central funds. Under the Act (section 15) a primary duty on the keeper of an infected animal is that he should, so far as is practicable, keep it separated from uninfected animals and notify the authorities of the fact of infection. In the prosecution of any offence relating to a disease controlled under the Act, the owner or person in charge of an infected animal is presumed to have known of the existence of the disease unless he shows that he did not know of it and could not have known by exercising due diligence (section 79(2)). It is arguable that no higher standard should be required for civil liability. Accordingly, we take the view that fault is the appropriate basis of liability in this case, again without reversal of the burden of proof. This view was largely supported by our commentators.

3.24 Communication of disease is merely one aspect of injury caused to other animals. The question therefore arises whether, apart from disease, strict liability should be imposed where livestock injure other animals generally, or, indeed, where they injure persons. We are not certain about this; nor, on consultation, was there any clear consensus. We are therefore not prepared to recommend a universal rule of strict liability to apply wherever livestock injure persons or animals, for our present purpose is merely to identify those special risks for which it is widely agreed strict liability should be imposed. We will, however, return to this when we come to discuss the precise form of strict liability which we think is appropriate. Meantime, we propose only what can be clearly supported on the basis of our consultation—in short, that strict liability as regards livestock should be imposed only for damage to land, its produce, or other property on land; and that otherwise liability for livestock should generally rest on fault, and particularly so where injury or damage is caused by straying in a public road,

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[1] Para. 5.10.

[2] *Robertson* v. *Connolly* (1851) 14 D.315; *Baird* v. *Graham* (1852) 14 D.615.

or similar place, or consists in the communication of disease to other animals. Accordingly, we **recommend:**

4. **The risk that livestock may stray in the course of foraging and cause damage to land, or the produce of land, or to other property on land, such as fences or buildings, should be recognised as a special risk for which strict liability, in an appropriate form, should be imposed.**

(Paragraphs 3.19–3.24)

Dangerous species

3.25 The *scienter* rule of the present law has two aspects. It is first a rule which imposes strict liability in relation to entire species of animals on the ground of an imputed common knowledge of their general characteristics. Separately, it is a rule which imposes strict liability for the individual animal which is actually known to its keeper to be dangerous on the basis of its past behaviour. On consultation, no very clear view emerged so far as the latter aspect was concerned. However, there was a general consensus that certain species of animals are intrinsically dangerous and therefore a special risk for which strict liability is appropriate. There was less agreement about how to define these dangerous species, and whether strict liability should extend to every form of injury and damage or only to injury to persons and animals. These are precisely the problems of the present law.[1] Nevertheless, the starting point for reform, we think, must be the recognition that there is a significant public demand that, somehow, certain species of animals should be singled out for special treatment as being intrinsically dangerous.

3.26 The obvious way to tackle the problem is to devise an appropriate open-ended definition of dangerous species which will establish a clear principle of classification and allow the court, if necessary, to extend the dangerous class from case to case in a systematic way. This is the approach of the present law, which singles out a class of animals *ferae naturae* (wild), defined as animals which, according to the experience of mankind, are dangerous to man, but it has not been wholly successful, as we tried to bring out in our discussion in Part II. Nevertheless, on consultation, there was some support for maintaining the present classification, or adopting the definition provided in the Animals Act 1971 in connection with its rules of strict liability for dangerous species:

> "6(2) A dangerous species is a species—
>
> *(a)* which is not commonly domesticated in the British Islands; and
>
> *(b)* whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe."

This definition is again open-ended. To that extent it is vulnerable to the same objections as the present definition of animals *ferae naturae.*

3.27 The alternative is a listing of dangerous species, or possibly, as a variant, a listing combined with a suitable open-ended definition to allow for principled extension of the dangerous class by judicial decision. The problem, as so often, is one of balancing certainty, which may avoid recourse to litigation, against flexibility of actual decision. In our view, since the issue is whether or not to impose strict liability, certainty is to be preferred if it can be attained without undue complexity. We think it can in the following way.

[1] See para. 2.6.

3.28 The Dangerous Wild Animals Act 1976 establishes a system of licensing under the supervision of local authorities for dangerous wild animals. These are animals belonging both to indigenous and exotic species. They are defined by reference to a list contained in the Schedule to the Act. The Schedule can be modified from time to time by order of the Secretary of State, and the current order is the Dangerous Wild Animals Act 1976 (Modification) Order 1984 (SI 1984 No. 1111). It lists numerous kinds of dangerous wild animals, including many of the animals which are regarded as falling within the present class of animals *ferae naturae*. In our view, this list should be adopted as the basis of the definition of dangerous species. It is precise. It includes those animals which are commonly enough kept in this country to be a real risk warranting the imposition of administrative controls. It is updated regularly on the basis of expert advice. Some additional element of flexibility may be required, we think, to permit the principled extension of the class of dangerous species by judicial decision, and we turn to this subsequently, when we come to consider the precise form strict liability should take. Meantime, we think it is appropriate, as a minimum, to use the 1976 Act to define a class of intrinsically dangerous animals and to impose strict liability for these animals where they cause personal injury or injury to other animals. Accordingly, we **recommend:**

5 The risk that dangerous wild animals, as defined in the Dangerous Wild Animals Act 1976, may attack and injure persons or animals should be recognised as a special risk for which strict liability, in an appropriate form, should be imposed.

(Paragraphs 3.25–3.28)

A general principle of strict liability for special risks

3.29 As regards dogs, livestock and dangerous wild animals, it is reasonably clear that strict liability is required, at least for the exceptional cases of special risk identified in Recommendations 3, 4 and 5. These exceptions are not dissimilar to those recognised under the present law. At this point, therefore, it may seem that there is a choice as to how we should proceed. We could adopt either the approach embodied in option (1) of the options for reform, set out in paragraph 3.2 above, or the approach embodied in option (4). The former requires no more than that we restate the several exceptions, with the few changes indicated, in a new set of discrete rules of strict liability, after the manner of the present law. The latter approach, however, requires something rather more difficult, namely the explicit formulation of a quite general principle of strict liability for special risks, under which the recognised special risks can be brought, but which also allows for some degree of judicial innovation where public opinion is not yet settled.

3.30 We reject the approach of option (1), as we indicated at the outset when stating the various options. This is partly because we do not in fact intend to restate and reformulate all the existing rules of strict liability. We reject the *scienter* rule as it applies to individual animals, for reasons which we discuss presently. But our main reason for preferring the approach of option (4) is that we think we can quite readily identify a general principle underlying the special risks for which we recommend strict liability. We also think that stating this principle in its full generality would avoid the inflexibility of discrete rules set up in the manner of the present law, and would not sacrifice such certainty as is attainable and desirable in case of strict liability.

3.31 The special risks which clearly cause our commentators most concern have several elements in common. First, the risk is perceived as normal for the kind of animal in question. That is, it arises out of animals' ordinary instinctive behaviour when left to fend for themselves. Second, the behaviour which is feared is associated with, or typically leads to, well-known kinds of injury or damage which are a natural and direct consequence of an animal having just those attributes which it has, or exercising just those habits which are part of its mode of life. In short, injury or damage of a characteristic sort is thought likely to occur if the animal is not effectively supervised. Finally, a special risk is most readily perceived when the injury or damage anticipated is also likely to be substantial.

3.32 To sum up, special risks are perceived where normal, unrestrained animal behaviour is thought likely to lead to substantial injury or damage. We think, therefore, that there should be a new rule of strict liability, of general application, founded on this principle. In Part IV we elaborate the form of strict liability which we think is required.

Individual animals known to have dangerous or harmful propensities

3.33 It remains to consider, among the cases of special risk, whether we should retain and reformulate the exception provided by the existing *scienter* rule as it applies to individual animals. We have had considerable difficulty with this. In fact, as we have already indicated, we reject this rule, and it is now necessary to explain why. The problem is not so much that the present rule is inadequate. It is of course inadequate, but we assume for the purposes of discussion that its defects, which we examined in Part II, can be cured. Our difficulty lies in the great diversity of views expressed to us on consultation, and the almost complete lack of any clearly accepted principles which might provide a basis for reformulating the rule. However, we do think that there is a great deal of common sense in the idea that strict liability should be imposed on the keeper of an animal which causes harm if he knows quite well from his own experience of it that it is dangerous. The argument for this was well put by the Law Commission for England and Wales when they proposed the reformulation of the *scienter* rule which is now contained in section 2(2) of the Animals Act 1971:

> "If, as we have recommended, there is to be a category of animals of a dangerous species for which strict liability is imposed, it would seem reasonable that an animal not belonging to that category should nevertheless give rise to strict liability in respect of injury or damage which it causes if that damage results from dangerous characteristics of the particular animal which are known to its keeper. As far as the potential defendant is concerned, he is equally the creator of a special risk if he knowingly keeps, for example, a savage Alsatian as if he keeps a tiger. As far as the potential plaintiff is concerned, an animal belonging to an ordinarily harmless species, which is known to its keeper to be dangerous is in the nature of a trap—a 'wolf in sheep's clothing'—which would seem to justify the same strictness of liability as applies to an obviously dangerous animal."[1]

[1](1967) Report, Law Com. No. 13, para. 17.

3.34 If this is accepted, there is much to be said for retaining and reformulating a *scienter* rule on the analogy of the Animals Act 1971, and in Part IV we in fact suggest how this might be done. Adopting this course, we would not only meet the demands of a quite substantial proportion of our commentators, who seemed to favour the retention of the principle in some form or other, but would also ensure that the law in this area is relatively homogeneous within the United Kingdom. This would have obvious benefits, not least in the matter of liability insurance. We would also be following the policy recommended recently by the Royal Commission on Civil Liability and Compensation for Personal Injury.[1] These are persuasive considerations, and although we ourselves are not finally persuaded, we accept that others may be. It is for this reason that we state and discuss a form of *scienter* rule in Part IV, so that our view on how it should be formulated might be known in case our recommendation against having such a rule is not accepted.

3.35 What has finally persuaded us, on balance, to reject the *scienter* rule as it applies to individual animals is that we believe that the same results can be achieved by applying the ordinary principles of fault. This was also the view taken by the Law Reform Committee for Scotland:

> "In our view, any legislation designed to reform the existing law should abrogate the principle of absolute liability arising from failure to restrain or confine an animal with known dangerous propensities . . . Instead, we recommend that liability for injury caused by animals should, in every case, depend on whether there has been a failure to exercise reasonable care to prevent the animal causing the injury. We believe that this simple principle could be effectively applied in all cases and that it is flexible enough to allow the court to have regard to all the circumstances of a particular case. Such circumstances would, of course, include the nature and disposition of the animal concerned and the knowledge which the defender had or ought to have had thereof . . ."[2]

Since we also believe that exceptions should be kept to a minimum, in effect to those cases of special risk where there is clear evidence of pressing public demand for strict liability, we see no reason to complicate the structure of the law by creating an exception which may do no more than duplicate the effects of the primary rules.

3.36 It may be thought that making a case in negligence is more difficult for a claimant, for it seems that he has to go through the extra step of proving breach of duty as well as knowledge. But we think that this is misleading and that the requirement is much less onerous than it appears. In the first place, if liability simply rests on fault, the very real difficulty of proving what someone else actually knows is avoided to some extent. All that is required is proof of facts from which it might be inferred that the keeper of the animal in question knew or ought to have known that his animal was likely to cause harm. Even under the present law a plea in negligence is sometimes preferred where a plea in *scienter* would be appropriate.[3] Second, once facts relevant to the necessary inference are proved, it should not be too difficult for the victim to show that the precautions taken to keep the animal safe were inadequate,

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[1] See para. 1.1.
[2] Twelfth Report, Cmnd. 2185 (1963), para. 11.
[3] *Brown* v. *Fulton* (1881) 9 R.36.

given the recent trend towards demanding higher standards of care which we referred to in our initial discussion of strict liability.[1]

3.37 Apart from these considerations, recent trends in law reform point to abolishing the *scienter* rule as it applies to individual animals. With the major exception of the Law Commission for England and Wales, law reform bodies which have considered the *scienter* principle in the last 20 years have generally rejected it. These include law reform bodies in Australia, New Zealand and Ireland, as well as the Law Reform Committee for Scotland. However, it is also true that these bodies generally rejected any special rules for dangerous animals, so to that extent even the exception which we propose for species of dangerous wild animals is somewhat against the trend. However that may be, we are finally of the view that an exception is not required in this case, and accordingly **recommend:**

6. **No exceptional provision should be made by way of imposing strict liability for an individual animal which is known to its keeper to have dangerous or harmful propensities, and liability in this case should rest on fault.**

(Paragraphs 3.33–3.37)

Summary

3.38 In this part we have sought to establish what we think are the first principles which should guide reform. Our fundamental proposition is that fault should remain a ground of liability for animals, subject to exceptional provision for special risks (Recommendation 1, para. 3.14). Exceptions should be kept to a minimum and should be made only for well-recognised risks, where public demand for special treatment is pressing. Strict liability in the appropriate form should be imposed for such special risks as are admitted (Recommendation 2, para. 3.14). The special risks which, on the evidence of our consultation, most obviously qualify as appropriate for strict liability are injury to persons or animals by dogs (Recommendation 3, para. 3.18), or by dangerous wild animals as defined in the Dangerous Wild Animals Act 1976 (Recommendation 5, para. 3.28); and damage to land, its produce, or property on land by livestock in the course of foraging (Recommendation 4, para. 3.24). These exceptions can, and should be, subsumed under a general principle embodied in a new rule of strict liability for special risks, which would allow a degree of judicial discretion in its application. No exception should be made for an individual animal which is known to its keeper to have dangerous or harmful propensities (Recommendation 6, para. 3.37). In short, we finally adopt the policy expressed in option (4) (para. 3.2) and reject options (1) to (3). However, we have set out our recommendations on special risks in such a way that any one of them may be adopted or rejected independently of the others. In Part IV we elaborate the form of strict liability which we think is required by the principles we have laid down in this part.

[1] Para. 1.17.

PART IV PROPOSALS FOR LEGISLATION

Introduction

4.1 In Part III we concluded that, in principle, strict liability should be imposed only exceptionally for special risks, and we provisionally identified several such risks. We also concluded that these exceptions could and should be subsumed under a general principle which would yield a new rule of strict liability for special risks. In this part we consider what form, precisely, that liability should take. There are three questions. First, how should the new rule of strict liability for special risks be formulated? Second, what defences should be permitted? Third, who should be liable? We then consider, in light of our answers to these questions, how a *scienter* rule applying to individual animals might be formulated if this were required, notwithstanding our rejection of it (Recommendation 6). Finally, we discuss two modes of what might be called self-help against animals, namely, detention of straying animals, and direct (possibly injurious) preventive action against a threatening animal in defence of persons or animals.

New rule of strict liability for special risks

4.2 The first requirement of the proposed new rule is that it should state a quite general principle of strict liability for special risks; the second, that the special risks for which we recommend strict liability should be expressly subsumed under it as particular examples of the general principle.

4.3 The main elements of the rule are clear.[1] First, there must be definite physical attributes or habits which can be associated generally with classes of animals. For this purpose the basic natural grouping is the species. Second, these attributes or habits must be such that animals so endowed or so behaving are likely to cause severe injury (or death) or material damage. What may or may not be likely in this context will be a matter on which evidence will have to be led, and for this purpose evidence of common experience and expert opinion alike should be admissible, though we would hope that our final formulation of the rule would minimise the need for the latter. Third, any injury or damage complained of, which need not be serious in itself, must be directly referable to the attributes or habits in question.

4.4 Accordingly, we **recommend:**

7. Strict liability should be imposed for injury or damage caused by an animal if—

(a) **it belongs to a species whose members in general (if not controlled) are likely to cause severe injury to persons or animals (or death) or material damage to property by virtue of their physical attributes or habits; and**

(b) **the injury or damage complained of is directly referable to these attributes or habits.**

(Paragraphs 4.2–4.4; clauses 1(1), (4), (5), 7)

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[1] See paras. 3.31, 3.32.

4.5 This immediately allows the special risks for which we recommend strict liability in Part III to be presented as particular examples of the general rule. Accordingly, we **recommend:**

> **8. For the purpose of applying the new rule of strict liability—**
>
> *(a)* **dogs and dangerous wild animals (as defined) should be deemed to be likely to cause severe injury (or death) by attacking persons or animals; and**
>
> *(b)* **livestock (the varieties listed) in the course of foraging should be deemed to be likely to cause material damage to land, the produce of land or other inanimate property on land.**
>
> (Paragraph 4.5; clauses 1(3), 7)

4.6 While we refer in Recommendation 8, in connection with dogs, to injury as including the death of persons, we obviously recognise that it is only in very rare circumstances that dogs actually kill people. The intention of the deeming provision is merely to bring dogs within the general principle in respect of the behaviour specified, that is attacking persons or animals, or in the expanded terminology of clauses 1(3) and 7, biting, savaging, attacking, harrying or chasing in a way likely to cause injury or suffering. In stating the rule as it applies to foraging livestock, we have specifically listed the animals which we think should be regarded as livestock (clause 1(3)(*b*)). This list is derived from current standard definitions, but excluding poultry and the like. This is not a matter on which we have strong views, and our recommendation would not be affected if the list were to be enlarged, or, indeed, even further restricted.

4.7 We have constructed the new rule of strict liability for special risks in this way for two reasons. First, by means of deeming specified animals behaving in specified ways a special risk, it ensures reasonable certainty, and therefore may reduce litigation, or facilitate the process of proof in litigation in the most common cases, where, also, the demand for strict liability is unequivocal. Second, by providing a general formula for strict liability, over and above the deeming provisions concerned with specified animals, we allow some scope for judicial innovation in those areas where, on the evidence of our consultation, opinions now vary quite widely. The latter aspect is particularly important, and if the rule is to function effectively in this respect, it is necessary that it should at least leave open the possibility of arguing the boundary cases which we referred to in Part III. For example, are dogs, as a class, likely to cause material damage to property in characteristic ways?[1] Are there animals not listed in the Dangerous Wild Animals Act 1976 which should nevertheless be treated for the purposes of liability in the same way as animals so listed; or are there species of dangerous wild animals likely to cause material damage to property?[2] Are livestock, or particular kinds of livestock such as bulls, or even specific breeds of bulls, likely to cause severe personal injury?[3] In our view, the general principle must be stated in such a way that all those questions, and others similar, can be raised and argued, if appropriate.

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[1]Paras. 3.15, 3.18.
[2]Paras. 3.25, 3.28.
[3]Para. 3.24.

4.8 To ensure that this can be done, we think it is essential to define "species", as used in the statement of the rule, as widely as possible. Thus it should be possible to consider not only the collective attributes and habits of species, but also those of particular forms or varieties of species. It must also be recognised that attributes and habits of certain sub-groups of members of the same species may vary. For example, the mature members of a species may be more dangerous than the young, or *vice versa*; the males more dangerous than the females, or *vice versa*; the females with young more dangerous than females without, and so on. We think it should be possible, if appropriate, to single out any such sub-groups within species and show by suitable evidence that the general principle is applicable. We therefore **recommend:**

9. "Species", as used in the statement of the new rule of strict liability, should include any form or variety of a species, and any sub-group of a species identifiable by age, sex or other criteria relevant to the behaviour of animals.

(Paragraphs 4.7–4.8; clause 1(2))

Ancillary provisions

4.9 The new rule of strict liability is intended to replace the existing rules of strict liability. This is expressly stated in clause 1(8), and clause 8(2) and the Schedule repeal the current statutory rules in the Winter Herding Act 1686 and the Dogs Acts 1906 to 1928. The ordinary rules of fault are unaffected by clause 1. It will always be possible to found an action on fault, whether or not the new rule of strict liability also applies.[1] Two further points, however, merit special mention.

4.10 First, we concluded expressly in Part III, in relation to livestock communicating disease to other animals, that liability in such a case should rest on fault.[2] We also indicated that reservations were expressed to us on consultation in connection with dogs communicating disease.[3] We have therefore decided that liability under the proposed new rule of strict liability should be expressly excluded in relation to injury which consists only of disease transmitted by means which are not likely to cause severe injury other than disease (clause 1(4)). However, injury is defined to include disease except in these circumstances (clause 7). This means that where liability would otherwise arise under clause 1, say where a dog attacked and bit a sheep, then, if disease is one of the direct consequences of the bite, damages will be recoverable in respect of the disease under clause 1.

4.11 Second, notwithstanding the general saving for the ordinary rules of fault, we have decided that express provision should also be made implementing our conclusion in Part III, that liability for livestock straying in a public road or similar place should rest on fault.[4] A generalised form of our conclusion is therefore stated in clause 1(5), which disapplies the new rule of strict liability in any case where the injury or damaged complained of is caused by the mere fact that an animal is present on a road or in any other place.

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[1] As required by Recommendation 1, para. 3.14.
[2] Para. 3.24.
[3] Para. 3.15.
[4] Para. 3.24.

4.12 Finally, there is a small point concerning animals which are hybrids, that is offspring of animals of different species. The definition of "animal" proposed in the draft Bill, after discussion with scientific experts, is very wide (clause 7). However, hybrids, we understand, are not classified scientifically as members of a species, at least if they are infertile or incapable of attaining genetic stability, and the operation of clause 1 depends on the proposition that every animal is a member of some species. Clause 1(2)*(b)* therefore provides that "species", as used in the new rule, includes a kind which is the product of hybridisation.

Defences

4.13 In the case of strict liability, in principle, defences should be limited in nature and clear in effect in order to minimise the possibilities of dispute. As regards the existing rules of strict liability, there are many doubts about which defences are available under one rule or another.[1] This is a serious defect. It is important, therefore, to state in relation to the new rule of strict liability precisely what defences are permitted. We have considered the following possible defences: *(a)* contributory negligence; *(b)* voluntary assumption of risk; *(c)* unavoidable accident;[2] *(d)* intervention of a third party; *(e)* "trespass", that is the defence arising from the suggestion in *Burton* v. *Moorhead,*[3] which we discussed in Part II in relation to the *scienter* rule;[4] *(f)* reversion to the wild state, that is the defence which may be available when a non-domesticated animal escapes or is abandoned and which, again, we referred to when discussing the *scienter* rule.[5] Our conclusion, in summary, is that only the defences mentioned under *(a), (b)* and *(e)* should be available, but some further comment is required in support of that conclusion.

4.14 We are quite clear that the defences of contributory negligence and voluntary assumption of risk should be available in the form in which they are established under the present law. These are standard defences in cases of strict liability not involving animals, and we see no reason for making an exception in the case of strict liability for animals. However, one consequence of this perhaps merits special mention. Under the Winter Herding Act 1686 failure to fence out straying livestock is not contributory negligence.[6] We would propose to allow the court, at its discretion, to treat such a failure as contributory negligence in appropriate circumstances. For, quite apart from considerations of general equity, there are circumstances where land-users may be under relevant statutory or contractual obligations to fence. However, we would not expect this to result in any greater imposition on land-users than the corresponding requirement which may be entailed by the duty of care owed to road-users to prevent animals from straying on the highway.[7] Contributory negligence will of course exclude liability wholly or partly, as under the present law, and an appropriate application of the Law

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[1]See paras. 2.9–2.11 (the *scienter* rule); 2.17–2.18 (Winter Herding Act 1686); 2.23 (Dogs Acts 1906 to 1928).
[2]See para. 1.16.
[3](1881) 8 R.892.
[4]Para. 2.11.
[5]Para. 2.11.
[6]See para. 2.17.
[7]See para. 3.20.

Reform (Contributory Negligence) Act 1945 will be required for this purpose. Accordingly, we **recommend:**

10. Contributory negligence, whether partial or amounting to sole fault, and voluntary assumption of risk should be available in their present form as defences to liability under the new rule of strict liability.

(Paragraph 4.14; clauses 1(6), 2(1)*(a)*, *(b)*, (3)*(a)*)

4.15 In contrast, we think that the defences of unavoidable accident, intervention of a third party and what we have called reversion to the wild state should not be permitted. Our reason is this. Strict liability is generally imposed because it is recognised that some risks are such that, where injury or damage results, innocent victims should not be expected to bear the loss. We think that whoever has an animal which creates such a risk must accept the onerous obligation to make reparation whenever loss occurs, even in circumstances where he cannot be blamed personally for what has happened. Knowing the risk and the nature of his obligation, he is in a position to insure against liability.

4.16 However, although we accept this general principle, we have had some doubts in the case of intervention of a third party. For example, it is apparently quite common for field gates to be left open by those involved in recreational pursuits in the countryside. It may seem unduly harsh that farmers should be strictly liable for damage done by livestock which may escape as a consequence from normally secure enclosures. On the other hand, this does seem to be the law at present under the Winter Herding Act 1686.[1] There is a yet more extreme example which also causes us concern. On several occasions recently, animals such as mink, which are extremely destructive, have been released in large numbers by unknown supporters of "animals' rights" movements. Here, too, it may seem inequitable that strict liability should be imposed on the victim of another's wrongdoing. Nonetheless the risk that destructive animals may be deliberately released is one which we think ought to be borne by those who keep such animals. It is for them to insure against those risks if they think fit. In some cases rights of relief against the wrongdoer may be available under the ordinary law. Therefore, despite these hard cases, we think, on balance, that the basic principle should be maintained. We **recommend:**

11. It should not be a defence to liability under the new rule of strict liability that the injury or damage complained of was due to—

(*a*) unavoidable accident, more usually referred to as *damnum fatale, vis major* or act of God;[2] or

(*b*) intervention of a third party;

nor should it be a defence—

(*c*) that the animal which caused the injury or damage had reverted to the wild state, having been abandoned by its former keeper, or having escaped.

(Paragraphs 4.15–4.16; clause 5(2)*(b)*)

While this recommendation, for the most part, does not require legislation, the exclusion of the defence of reversion to the wild state is in effect achieved by clause 5(2)*(b)*, which provides for the continuing liability of an owner or

[1] See para. 2.17.
[2] See para. 1.16.

possessor of an animal, as the case may be, notwithstanding the abandonment or escape of the animal.

4.17 We have had most difficulty with the defence of "trespass", which, as we mentioned when discussing the *scienter* rule, is of rather uncertain scope in Scots law, if indeed it exists at all.[1] However, if an animal on its own territory, as it were, injures persons or animals coming on to the land where they should not be, it does seem harsh to impose strict liability on the innocent keeper of the animal. A defence is available in these circumstances in England and Wales under section 5(3) and (4) of the Animals Act 1971, and a comparable defence is also permitted in similar circumstances in a prosecution under the Dogs (Protection of Livestock) Act 1953.[2] That Act, which makes it an offence where a dog worries livestock, applies in Scotland as well as in England and Wales.

4.18 A major problem, if the defence of "trespass" is permitted, is the common practice of keeping animals, invariably dogs, to protect persons and property against intruders. One solution, adopted in New South Wales for example, is to permit the defence without qualification, but to allow an action to be founded on negligence in appropriate circumstances.[3] The solution in England and Wales is similar but rather more complex. In the general case of damage caused to a person trespassing the defence is permitted but qualified. It must be shown that the animal causing the damage was not kept to protect persons or property, or that keeping the animal for that purpose was reasonable (Animals Act 1971, section 5(3)). In the case of a dog which injures trespassing livestock the defence is permitted without qualification (Animals Act 1971, section 5(4)). In both cases the alternative of bringing an action based on negligence is available. On balance, we think that the defence should be available, both where persons are injured and where animals are injured, and in both cases should be qualified in the manner provided in the Animals Act 1971. In addition, we think that account should be taken of the Guard Dogs Act 1975 under which it is a criminal offence to have a guard dog at certain premises unless it is under the control of a competent handler, or secured, and warning notices are exhibited. In our view, these conditions, at least, must be complied with where appropriate before the keeping of a guard dog, as defined in the Act, can be regarded as reasonable for the purpose of pleading the defence proposed. Accordingly, we **recommend:**

12. It should be a defence to liability under the new rule of strict liability that injury or damage sustained by a person or animal was sustained while trespassing, but only if the animal causing the injury or damage *(a)* was not itself trespassing, and *(b)* was not kept to protect persons or property, or was so kept in circumstances such that the keeping of it for that purpose was reasonable, with due regard to the Guard Dogs Act 1975, where appropriate.

(Paragraphs 4.17–4.18; clauses 2(1)*(c)*, (2), (3)*(b)*)

It should be noted that the existence of this defence will not in any way preclude the possibility of founding an action on fault rather than bringing it under the new rule of strict liability, since the new rule does not affect the ordinary principles of fault under the present law (clause 1(8)).

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[1] See para. 2.11.
[2] Section 1(3).
[3] Dog (Amendment) Act 1977 (Act No. 27, 1977), s.2.

Persons liable

4.19 We are quite clear that, in principle, liability under the new rule of strict liability should be imposed jointly and severally on the owner and any other person having possession of the animal in question. We use the term keeper to cover both cases. However, we do recognise that possession of an animal may be taken temporarily in such circumstances that the person so taking possession of it should not be held strictly liable for injury or damage which it subsequently causes. The precise circumstances are admittedly difficult to define, as appears in our discussion of the problem in Part II in the context of the *scienter* rule.[1] However, we think that if the purpose of detaining an animal is merely to protect the animal itself, or some other animal, or a person, or to prevent damage, or to restore the animal to its owner or rightful possessor as soon as possible, then the detainer should not be liable under the new rule. He may of course be liable under the ordinary principles of fault which are not affected by the new rule. In addition, we think it would be essential that the court should have a discretion to determine that temporary detention has, as a matter of fact, become full possession, as it were, for the purpose of imposing liability under the new rule.

4.20 We also recognise the converse problem. Where an animal is not in the custody of its owner, he may have very little say in how it is supervised, and may therefore be entirely blameless if it causes injury or damage. If in fact he is not blameless, if, say, he has surrendered the custody of the animal negligently, then an action will lie against him on that ground under the ordinary principles of the present law. In these circumstances, it seems harsh to impose strict liability on the blameless owner not in possession of his animal. However, we think that the matter must be looked at from the viewpoint of the victim in the first instance. The rationale of strict liability requires that the innocent victim should have recourse against some keeper of the offending animal, and the person having possession of it may be merely detaining it temporarily, or the fact of possession may be difficult to prove. Ownership, in contrast, is more clear cut from the legal point of view. Imposing liability on the owner, therefore, should ensure that the victim will have a remedy under the new rule in most circumstances. However, we think that section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 should apply to actions under the new rule of strict liability as it applies to actions based on fault. This would allow for an action for contribution; or owner and possessor could be conveniently conjoined in one action under third party procedure, irrespective of the pursuer's initial choice of defender, and the court could apportion damages between them in equitable shares if it saw fit, having heard arguments, perhaps, as to their respective "blameworthiness" vis-a-vis each other. The victim's position would not be prejudiced, and a complete settlement of the claims of all parties could be expeditiously achieved in the one process.

4.21 Finally, we think that where a child under 16 is the owner of an animal or has possession of it, liability under the new rule of strict liability should be imposed not only on the child himself, but also on the person who has actual care and control of the child. This again is intended to minimise the risk that the victim will have no person of substance to proceed against.

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[1]Para. 2.10.

4.22 Gathering together these various conclusions, we accordingly **recommend:**

13. **Liability under the new rule of strict liability, where an animal causes injury or damage, should be imposed jointly and severally on the owner of the animal and on any other person having possession of it, and, if a child under 16 is the owner of the animal or has possession of it, on any person having actual care and control of the child, as well as on the child himself.**

(Paragraphs 4.19–4.22; clause 5(1))

14. **Liability under the new rule of strict liability should not be imposed on a person who has possession of an animal by reason only of the fact that he has detained it temporarily for the purpose of protecting it, or any other animal, or any person, or of preventing damage, or of returning it as soon as is reasonably practicable to its owner or a rightful possessor of it.**

(Paragraphs 4.19, 4.22; clause 5(2)*(a)*)

15. **Section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 should apply to actions based on the new rule of strict liability as it applies to actions based on fault.**

(Paragraphs 4.20, 4.22; clause 1(7))

4.23 There are several ancillary provisions to note in connection with the above recommendations. First, the implications of joint and several liability are reflected in the drafting of the substantive clauses of the Bill which create the new form of strict liability, namely, clauses 1 and 2. Second, as we have already mentioned,[1] liability as owner or possessor of an animal continues notwithstanding the abandonment or escape of the animal (clause 5(2)*(b)*). The potential liability only ceases when another person acquires ownership of the animal or comes into possession of it. Third, the legal position of the Crown is preserved in clauses 5(2)*(c)* and 6.

Strict liability for individual animals known to have dangerous or harmful propensities

4.24 In Part III we concluded that liability for an animal which is known to its keeper on the basis of its past behaviour to have dangerous or harmful propensities should rest on fault.[2] That is, we rejected the present *scienter* rule as it applies to individual animals. However, as we indicated in our discussion, the issue was finely balanced, and we realise that our final decision is one which may be controversial. It seems important, therefore, that we should try to show how a *scienter* rule in the form rejected might be fitted into the framework which we have established in case such a rule is eventually required.

4.25 In Part II we discussed the main problems of this form of the *scienter* rule in some detail.[3] Our view is that most of these problems would be resolved if the general conditions which we have laid down in relation to the new form of strict liability were also to apply to any *scienter* rule which might

[1] Para. 4.16.
[2] Recommendation 6, para. 3.37.
[3] Paras. 2.6–2.12.

be introduced. This could be achieved most simply by inserting an appropriately formulated rule in clause 1(1) of the Bill as set out in Appendix A. Thus we might sub-divide clause 1(1)*(b)* into paragraph *(b)*(i), comprising the content of the existing paragraph *(b)*, and a new paragraph *(b)*(ii) as follows:

> "1(1) Subject to subsection (4) and (5) below and section 2 of this Act, a keeper of an animal shall be liable for any injury or damage caused by it if—
>
> *(b)* the animal—
>
> (i) belongs to a species whose members generally are by virtue of their physical attributes or habits likely (unless controlled or restrained), or
>
> (ii) is known to the keeper to be likely (unless controlled or restrained) by virtue of its physical attributes or habits,
>
> to injure severely or kill persons or animals, or damage property to a material extent . . ."

If the *scienter* rule is stated in this way, what it is for an animal to have dangerous or harmful propensities is clearly defined, viz. being likely to cause severe injury or material damage by virtue of physical attributes or habits (clause 1(1));[1] who should be liable is clear (clause 5);[2] the defences are unambiguous (clauses 2, 5(2)*(b)*);[3] and the problem of causation is resolved, that is the problem as to whether or not there is any test of remoteness of damage which might apply to exclude liability in appropriate circumstances (clauses 1(1)*(c)*, (4), (5), 7).[4]

4.26 A *scienter* rule in this form is, with one qualification, at least as certain in its operation as the rule contained in clause 1(1), (2) and (3) as presently formulated. The one qualification, however, is important, since it is integral to the *scienter* principle as such. It is this. We doubt if a really adequate specification of the conditions of knowledge (whether direct or indirect) can be readily formulated.[5] We also doubt whether it is possible to eliminate entirely what could well be a source of confusion for the pleader and the court. It would be necessary to plead, in the alternative, *(a)* under the *scienter* rule, that the defender knew that his animal was likely to cause severe injury or material damage by virtue of its physical attributes or habits, or *(b)* for the purpose of establishing fault, that the defender knew or ought to have known this. Apart from these doubts, which of course are among the reasons why we finally decided to reject the *scienter* rule in this form, we think that the rule we have suggested is reasonably effective and should be adopted if such a rule is required. Accordingly, we **recommend:**

> **16. Without prejudice to Recommendation 6,[6] if a rule is required imposing strict liability for an individual animal which is known to its keeper to have dangerous or harmful propensities, this should be in**

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[1]Cf. para. 2.7.
[2]Cf. paras. 2.9–2.10.
[3]Cf. para. 2.11.
[4]Cf. para. 2.12.
[5]Cf. para. 2.8; but see section 2(2)(*c*) of the Animals Act 1971.
[6]Para. 3.37.

the following form, and should be inserted appropriately into clause 1(1) of the Bill set out in Appendix A:

"1(1) Subject to subsections (4) and (5) below and section 2 of this Act, a keeper of an animal shall be liable for any injury or damage caused by it if—

***(b)* the animal—**

(ii) is known to the keeper to be likely (unless controlled or restrained) by virtue of its physical attributes or habits,

to injure severely or kill persons or animals, or damage property to a material extent."

(Paragraphs 4.24–4.26; clause 1(1)*(b)*(ii)—see note on clause 1(1))

Detention of straying animals

4.27 In Part II we described the right to detain and sell straying livestock under the Winter Herding Act 1686 and commented on some of the problems to which it gives rise.[1] The Law Reform Committee for Scotland thought that this provision should be retained in modern legislation and strengthened, and, on consultation, there was a degree of support for this.[2] A comparable remedy is available in England and Wales under section 7 of the Animals Act 1971.

4.28 However, many of our commentators expressed reservations, including bodies representing significant agricultural and land-use interests. For example, it was said that the right to detain livestock, if permitted, should be confined to cases of straying on enclosed land. There was also considerable doubt about whether the remedy was realistic, particularly in what was alleged to be the most common case, namely, livestock straying into private gardens, since most of those likely to be affected would have neither the means nor the experience to secure and care for the offending animals. We share these doubts. We are also concerned that valuable animals might be detained in pursuance of relatively trivial claims in order to compel unjustifiably high settlements. Finally, although we made extensive enquiries of those concerned with agriculture throughout Scotland, we found no evidence that the present remedy is commonly used.

4.29 On the other hand, we realise that there may be circumstances in which it could be useful to detain straying animals simply to prevent injury or damage. And here we emphasise animals. There is no reason in principle why detention for this purpose should not apply to animals other than livestock. On balance, therefore, we are prepared to recommend a right to detain any animal for the limited purpose of preventing injury or damage by it. We do not think, however, that any lien enforceable by sale should be created over detained animals. There may be a case for a strengthened remedy in some localities, but we take the view that this raises policy considerations which are more properly a matter for central and local authorities.

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[1]Paras. 2.14, 2.19.

[2]Twelfth Report, Cmnd. 2185 (1963), para. 14.

4.30 As regards the subsequent care and return (or disposal) of detained animals, we think that it would be appropriate to apply existing statutory provisions, namely, sections 3 and 4 of the Dogs Act 1906 (stray dogs) and Part VI of the Civic Government (Scotland) Act 1982 (lost and abandoned property), which applies at present to living creatures other than stray dogs and livestock (section 74). The procedures under these Acts involve recourse to the police and seem quite suitable. We do not envisage the remedy being used frequently.

4.31 We therefore **recommend:**

17. An occupier of land should be entitled to detain any animal straying on his land in order to prevent injury or damage by it.
(Paragraphs 4.27–4.31; clause 3(1))

18. Part VI of the Civic Government (Scotland) Act 1982 (lost and abandoned property) and section 4 of the Dogs Act 1906 (delivery of stray dogs to police) should apply, as appropriate, where an occupier of land detains a straying animal to prevent injury or damage.
(Paragraphs 4.27–4.31; clause 3(2))

It should be noted that detention under clause 3 is treated as a case of temporary detention under clause 5, so that strict liability for injury or damage by an animal while detained will not be imposed on the detainer by reason only of his detention of it.[1]

Preventive action against animals

4.32 A major problem which we examined in our consultative memorandum was livestock-worrying by dogs[2] Under the new rule of strict liability, which we propose, strict liability will be imposed where a dog attacks livestock, or, indeed, animals generally.[3] But our concern previously was, and still is, whether more is required.

4.33 One of the solutions which we canvassed on consultation was strengthening and extending the right, as it then existed at common law, to take direct action, possibly injurious action, against a dog worrying livestock. This had been the approach adopted in the Animals Act 1971 (section 9). However, just before our consultative memorandum was published,[4] an amendment modelled on section 9 of the 1971 Act was proposed to the Civic Government (Scotland) Bill which was then before Parliament. This has now been enacted as section 129 of the Civic Government (Scotland) Act 1982, although it was made clear in Parliament by the Parliamentary Under-Secretary of State at the Scottish Office, when accepting the amending clause, that it was intended as a temporary measure:

> ". . . the new clause would be a temporary measure to deal with the problem of liability in respect of dogs worrying sheep. The Scottish Law Commission will publish in the next month or two a consultative memorandum on civil liability in relation to animals and that will sum up its thorough and detailed work in the whole area . . . which, in due course, will result in thorough and comprehensive legislation. This is an

[1] See para. 4.19.
[2] Paras. 5.23–5.29.
[3] See paras. 3.16–3.18; Recommendation 8, para. 4.5.
[4] August 1982.

interim measure, but I entirely accept the seriousness of the problem and the fact that one cannot guarantee when future legislation will reach the statute book."[1]

It is still our task, therefore, to consider whether such a provision as is now contained in section 129 of the 1982 Act is required, and, if so, whether the provision is in the most suitable form. Separately, we will also consider other remedies in Part V, though without making specific recommendations with regard to them.

4.34 There is a wider context in which the issue of taking preventive action against a dog to protect livestock must be set. Generally, where rights of property subsist in an animal, killing or injuring it deliberately or negligently will found a claim for damages. This means, in effect, that killing a domesticated animal, such as a dog, in which rights of property subsist notwithstanding that it is at liberty to roam, will only be justifiable in certain circumstances. At common law, it was always a good defence to a claim for damages for killing or injuring an animal, that the death or injury was the result of reasonable preventive action to protect, for example, persons, game, at least while in preserves, livestock, including poultry, and other animals.[2] The problem, however, in the context of dogs worrying livestock, was thought to be that preventive measures could only be taken during an actual attack or where an attack was imminent, and not when the offending animal was escaping.[3] This, it was said, did not take account of the fact that dogs which have worried livestock are likely to do so again, nor even of the practical difficulties of tracing their owners.[4] Section 129 of the Civic Government (Scotland) Act 1892 was intended to solve this supposed problem.

4.35 However, we have some doubts about this. The new provision in section 129 of the 1982 Act is modelled on the solution to what was certainly a problem in England and Wales on the assumption that the same problem existed in Scotland. But this assumption may not have been well-founded. In Scotland, preventive action had in fact been allowed against a dog escaping after an attack.[5] There also seems to have been a well-established tendency for the court in Scotland to consider the necessity of any measures taken from a more subjective viewpoint than the court in England and Wales, that is more from the viewpoint of the person taking preventive action. So, for example, the presence of the owner of the offending animal did not necessarily exclude preventive action.[6] It is not altogether clear that these features are adequately preserved in the new provision in the 1982 Act. However, the provision is clearly seen by the farming community, who pressed for its introduction, as serving a useful function, and certainly there

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[1]Parliamentary Debates: House of Commons Official Report: First Scottish Standing Committee: Twenty-second Sitting, Thursday 1 July 1982, column 907.

[2]*Turner* v. *M'Laren* (1887) 3 Sh. Ct. Rep. 57; *Smith* v. *Aitken* (1897) 13 Sh. Ct. Rep. 279; *Shedden* v. *Eddington* (1904) 20 Sh. Ct. Rep. 268; *Strachan* v. *Ross* (1925) 41 Sh. Ct. Rep. 212; *Watt* v. *Logan* (1945) 61 Sh. Ct. Rep. 155.

[3]*Cresswell* v. *Sirl* [1948] 1 K.B. 241; *Mitchell* v. *Duncan* (1953) 59 Sh. Ct. Rep. 182.

[4]Cf. Law Commission, Report, (1967) Law Com. No. 13, para. 85.

[5]*Duncan* v. *Rodger* (1891) 7 Sh. Ct. Rep. 313; contrast *Jackson* v. *Drysdale and Craig* (1896) 12 Sh. Ct. Rep. 224.

[6]*Wilson* v. *Buchanan* (1943) 59 Sh. Ct. Rep. 54.

can be no harm in having a clear statutory statement of a remedy which it is widely agreed should be available. The real question is whether the new provision can and should be further clarified and strengthened, and, more important, whether it should be extended to include preventive action against animals other than dogs and protection of persons and other animals as well as livestock.

4.36 We are quite clear that the provision should not be confined simply to action taken against dogs. We are equally clear that it should extend to the protection of persons. We are less certain about the protection of animals other than livestock, that is, livestock in the narrow sense of the varieties of livestock most commonly kept on farms, and no very clear consensus emerged on consultation. However, we see no reason, in principle, for making a special case of protecting livestock in this narrow sense. We think, therefore, that the provision should extend to protecting not only farm animals such as sheep and cattle, but also all domestic animals, as well as all non-domestic animals while they are in captivity. Apart from issues of scope, we think that there are three main areas where the provision in section 129 of the 1982 Act can be improved.

4.37 First, there may be some doubt under the new provision as to whether the possibility of taking direct preventive action against an offending animal is excluded when its owner, or someone in charge of it, is present at the scene of the attack or anticipated attack. We think that it should not be excluded by reason only of such presence, and that this should be made quite clear in the statutory formulation of the defence. However, we do accept that it is an essential condition of the defence that the person taking preventive action should have reasonable grounds for believing that the measures taken are the only practicable means of preventing injury in the circumstances. This, of course, entails that he should consider whether or not someone actually present and in charge of the animal in question is capable of controlling it effectively if required to do so.

4.38 Second, in the case where an animal has been engaged previously in an attack, but is neither so engaged nor threatening an attack at the relevant time, though remaining in the vicinity not under control, we do not think that there should be any requirement, as provided by section 129(3)*(b)* of the 1982 Act, to consider the practicability of ascertaining who owns the animal or has charge of it before taking preventive action. No doubt, if the keeper of the offending animal were known, he could be sued subsequently for damages, or required to keep his animal safely confined in future, or even to destroy it. But the real question in the circumstances posited is whether action is required there and then to prevent injury or further injury. If such action is reasonably required, there is simply no practical utility in further considering whether the keeper of the offending animal can be traced or not. However, we do think that it should be made quite clear that action against an animal in these circumstances must be properly preventive and not merely punitive.

4.39 Finally, we doubt whether the exclusion of the proposed defence where preventive action is taken to protect "trespassers" is really acceptable (section 129(2)*(b)* of the 1982 Act). In many cases the person faced with the necessity of taking preventive action may have no means of knowing whether the person or animal he intends to protect is trespassing or not. We would

therefore reject such an exclusion. However, we would instead prohibit the defence if the person taking preventive action is where he is for the purpose of engaging in some criminal activity and the action taken is in furtherance of that activity. For it seems inequitable that such a person killing a valuable animal, say in self-defence, should be able to do so and be protected from a subsequent claim for damages.

4.40 Gathering these conclusions together, we accordingly **recommend:**

19. It should be a defence to a claim for damages in respect of killing or injuring an animal that the death or injury was the result of preventive action to protect a person or animal (domestic or captive non-domestic) in the reasonable belief that the measures taken were the only practicable means of preventing injury in the circumstances.

(Paragraphs 4.32–4.40; clause 4, 8(2), Schedule)

20. The defence to a claim for damages in respect of killing or injuring an animal, that the death or injury was the result of preventive action to protect a person or animal (domestic or captive non-domestic), should be subject to the following conditions:

(a) **the defence should not be excluded by reason only that the owner or a person in charge of the animal killed or injured was present when the animal was killed or injured;**

(b) **the defence should be permitted where an animal which has been previously attacking persons or animals (domestic or captive non-domestic) remains in the vicinity where the attack took place and is not under the control of any person (whether or not it is threatening an attack), provided only that action is taken to prevent a further attack and is not merely punitive; there should be no requirement to consider the practicability of ascertaining who owns or has charge of the animal in question before taking action;**

(c) **the defence should not be excluded where action is taken to protect "trespassers", but should be excluded where the person taking preventive action is where he is for the purpose of engaging in some criminal activity and the action taken is in furtherance of that activity.**

(Paragraphs 4.32–4.40; clauses 4(2), (4))

Subject to the above, we think that the provision in section 129 of the 1982 Act is broadly acceptable, although we do in fact propose a completely redrafted version of it in clause 4 of our Bill.

PART V SOME WIDER ISSUES

Introduction

5.1 In this part we comment briefly on some wider issues which touch on our main concerns in this Report, but make no further recommendations. These issues are issues which we also discussed in our consultative memorandum.[1]

5.2 It is arguable that the effectiveness of the remedies provided by the civil liability system depends on the availability of insurance; in particular, that strict liability should be reinforced by a requirement of compulsory insurance. There are also more profound criticisms of the civil liability system generally, and significant support for making some provision for compensation to be paid from locally or centrally administered funds without inquiry as to fault. This is commonly referred to as no-fault compensation. These are both matters which the Royal Commission on Civil Liability and Compensation for Personal Injury discussed in their report[2] It seems appropriate that we should also consider them, albeit briefly, in the particular context of liability for animals.

Compulsory insurance

5.3 Earlier we drew attention to the significance of liability insurance as an element in the view that the system of civil liability primarily operates to allocate risk and redistribute loss.[3] Indeed, it has been said that the law of civil liability generally can be regarded as a means of inducing those who cause losses to others to procure insurance in their favour by compelling them to pay for the losses themselves if they fail to procure such insurance.[4] On this view the law of civil liability operates as a sanction for failing to insure, which may be at least a useful corrective to the ordinary view that liability insurance is merely ancillary to legal liability as a means of securing compensation.

5.4 In the case of some activities involving animals compulsory insurance schemes already operate in conjunction with licensing controls. For example, under the Riding Establishments Acts 1964 and 1970 the licence holder must have insurance both in respect of injury to persons hiring or using his horses and in respect of injuries which such persons may cause to others; under the Dangerous Wild Animals Act 1976 and the Zoo Licensing Act 1981 the licence holder must have insurance in respect of any damage caused by wild animals in his keeping; and, of course, work-related injuries caused by animals would be covered in the usual way by employers' liability insurance.

5.5 Given these provisions, the question arises whether compulsory insurance might be extended in the case of animals. The Royal Commission on Civil Liability and Compensation for Personal Injury considered animals in particular as a source of personal injury.[5] However, they did not examine questions of insuring animals in detail, although they did recommend that the Dangerous Wild Animals Act 1976 and the Riding Establishments Acts 1964 and 1970 should be amended either to specify practical limits to the third

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[1]Part VI.
[2]Report, Cmnd. 7054 (1978), Vol. I, paras. 281–298, pp. 69–72; paras. 320–324, pp. 75–76.
[3]Para. 3.8.
[4]P.S. Atiyah, *Accidents, Compensation and the Law* (1970), p. 252.
[5]Report, Cmnd. 7054 (1978), Vol. I, Chapter 30, pp. 334–339; Vol. II, Chapter 13, pp. 80–81.

party insurance cover required, or to give the licensing authorities discretion to determine what is a satisfactory amount.[1] In particular, they did not examine the case for compulsory insurance. This omission is rather surprising, for when they came to consider liability for exceptional risks, for which they recommended a scheme of strict liability to be implemented in primary and subordinate legislation, they said:

> "We considered whether the listed things and activities should be subject to compulsory third party insurance. Although we would not go so far as to say that compulsory insurance should be automatic in every case where strict liability was imposed, we would expect it to be found appropriate in most cases. One of the difficulties involved in imposing compulsory insurance is the practical one of supervising and enforcing it. Where, however, strict liability has been imposed in specific cases by statutory instrument, [as it would be according to the general scheme proposed] this difficulty should be less acute."[2]

This might suggest that a compulsory insurance requirement should be imposed in the case of animals to cover at least certain categories of risk for which strict liability is considered appropriate. Categories of risk which it may be particularly relevant to consider from this point of view are the risks presented by dogs, either generally, or in relation to livestock-worrying, and the risks presented by livestock. These problems are peculiarly intractable, as our earlier discussions show,[3] and it is arguable that their satisfactory resolution requires more than just clarifying and modifying the existing rules of liability, helpful though that may be. Certainly, on consultation, a large number of our commentators supported an extension of compulsory insurance and not only to dogs and livestock, although insurance interests were generally opposed.

5.6 More recently, there have been some developments of particular significance. What seems to have most influenced the Royal Commission on Civil Liability and Compensation for Personal Injury, when considering the appropriateness of compulsory insurance with regard to any given activity, was their assessment of the practicality of supervising and enforcing an insurance requirement in relation to that activity. This approach is consistent with the piece-meal development of the existing provision for compulsory insurance, which tends to cover activities which are also subject to licensing and other controls.[4] This, it seems, facilitates the introduction and management of appropriate schemes of compulsory insurance.

5.7 In November 1984 a consultation paper was issued jointly by the Department of the Environment, the Scottish Development Department and the Welsh Office. This paper dealt with the important issue of financing effective dog control through locally administered schemes for the registration of dogs, with limited discretion to levy realistic fees. Should such schemes come into operation, the extension of compulsory insurance to dogs at least

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[1]Report, Cmnd. 7054 (1978), Vol. I, Recommendation 176, p. 386. The reason for the Recommendation was that, in practice, insurers were refusing to provide unlimited cover which the Acts apparently required.

[2]Report, Cmnd. 7054 (1978), Vol. I, para. 1668, p. 348; see also paras. 3.20–3.24, pp. 75–76.

[3]Paras. 3.16–3.24, 4.32–4.40.

[4]See para. 5.4.

may be more feasible than, arguably, it is at present. This of course raises considerations of policy which we accept are not properly within our competence. For this reason we make no recommendations. However, we do urge central and local authorities to consider seriously whether the changes now being discussed, if implemented, also provide a useful opportunity to extend compulsory insurance to cover dogs, at least in respect of certain risks. We know from our consultation that such schemes operate successfully elsewhere, for example in Denmark. However, we have not investigated them in detail, since we can claim no particular expertise in the field of insurance.

5.8 Finally, we have also considered the costs of insurance in relation to our proposals and our suggestion that the possibility of extending compulsory insurance might be examined. However, we have not been able to obtain any precise quantitative information from the insurers whom we consulted. We accept that any proposal to change the basis of liability for animals, or to extend the existing compulsory insurance requirements, may affect the costs of insurance. But we think it should not be assumed that there would be large increases in premium rates. On the information given to us by insurers, the incidence of claims in respect of animals is low in relation to the number of insured, so changing the basis of liability in any case seems unlikely to have significant effects on premiums; nor is this ratio likely to change, even with the considerable expansion of insurance which would result from an extension of compulsory insurance. However, it is difficult to assess the effects of such changes precisely. In Western Australia, where the exemption from liability for livestock straying on a public road, provided by the rule in *Searle* v. *Wallbank,*[1] was replaced in 1976 by liability based on negligence, premium rates were not affected.[2] But, of course, a different pattern might emerge in this country, or in case of other risks, or where strict liability replaced fault-based liability.

5.9 Another aspect of the problem of costs is the uncertainty of the effects on costs if the number of larger claims was to increase significantly. It is possible that providing full indemnity at reasonable cost would be impracticable for the insurance companies. This is the problem which emerged in relation to the compulsory insurance requirements under the Riding Establishments Acts 1964 and 1970 and the Dangerous Wild Animals Act 1976.[3] Similar considerations led the Law Reform Commission of Western Australia, when examining the problem of livestock straying on the highway, to recommend that an upper limit be fixed beyond which damages could not be awarded in respect of any one accident.[4] This, as the Commission acknowledged, gives rise to the problem of fixing and regularly adjusting the limit, as well as to difficulties in case of multiple accidents. However, in our view, the possible limits and costs of insurance should neither dictate the nature and extent of liability in any particular case, nor exclude consideration

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[1]1947 A.C. 341.

[2]The Law Reform Commission of Western Australia, (1981) Report on Liability for Stock Straying on to the Highway, para. 6.16.

[3]See para. 5.5.

[4](1981) Report on Liability for Stock Straying on to the Highway, paras. 6.18–6.21; Highways (Liability for Straying Animals) Act 1983 (Act No. 17 of 1983).

of the circumstances where compulsory insurance might otherwise be appropriate.

No-fault compensation

5.10 No-fault compensation is compensation obtainable, without proving fault, from a fund instead of proceeding against the person responsible for causing the injury or harm complained of.[1] In this country there is already a significant no-fault provision. Contributory benefits are available under the social security scheme, non-contributory benefits to the disabled and medical benefits to all, and local authorities provide social services of various kinds. The existence of this provision does not of course exclude the simultaneous recovery of damages under the ordinary system of civil liability and, indeed, damages continue to be the main remedy. To the extent that animals might be involved in injuries at work there is already an element of no-fault compensation under the existing general provisions covering employees at work, for example, sickness benefit.

5.11 The Royal Commission on Civil Liability and Compensation for Personal Injury examined the case for a special scheme of no-fault compensation for injuries caused by animals. They concluded:

> "1623 Our conclusion is that a case has not been made out for a scheme of no-fault compensation for injuries caused by animals. There is no ready and cheap method by which all of the large number of keepers of animals could be made to contribute and there is a relatively small number of serious injuries caused by animals (other than those covered by the industrial injuries scheme and the proposed motor vehicle injuries scheme). We think that any attempt to provide no-fault compensation for all people injured by animals would involve administrative effort quite out of proportion to the benefits.
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> 1624 We considered whether there was sufficient justification for a special no-fault scheme covering injuries caused by dogs; the dog licence fee, suitably increased, could provide a means of financing such a scheme. Our intention was drawn in particular to the problem of unidentified dogs. An inter-departmental working party on dogs, under the chairmanship of Mr. W. J. S. Batho of the Department of the Environment, published a report in 1976 which included an invitation to us to consider whether a compensation fund might be set up from licence revenue to meet claims for injury by people who had been attacked by unidentified dogs. On balance, we feel that the hardships caused by the lack of a special scheme, whether for all dogs or just for unidentified dogs, are not sufficient to justify the administrative machinery which would be required."[2]

5.12 No-fault compensation in relation to harm caused by animals exists in other jurisdictions in different forms. In New Zealand, for example, there is a comprehensive no-fault scheme covering personal injury by accident and displacing the law of civil liability in respect of all compensatable injuries.[3] In

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[1]Royal Commission on Civil Liability and Compensation for Personal Injury, Report, Cmnd. 7054 (1978), Vol. I, para. 34, p. 9.

[2]Report, Cmnd. 7054 (1978), Vol. I, pp. 338–339.

[3]A. P. Blair, *Accident Compensation in New Zealand* (1978).

Ontario compensation is payable by municipalities up to fixed maximum amounts where livestock or poultry are killed or injured by a dog.[1] The administration of the system depends on a network of local valuers who investigate and report on claims. Municipalities have a right to recover the amount of the damage paid from the owner of the dog without having to prove that it was vicious or accustomed to worrying livestock or poultry.

5.13 On consultation, there was very little support among our commentators for the introduction of a new scheme of no-fault compensation, whether generally, or in relation to particular problems such as livestock-worrying by dogs. The general consensus appeared to be that this was not really practicable, although it was difficult to know how far the views expressed to us simply reflected the conviction that no-fault compensation for injury or damage by animals was unlikely to be considered by the authorities, given the adverse conclusion of the Royal Commission on Civil Liability and Compensation for Personal Injury.

5.14 Notwithstanding the views of the Royal Commission, we are impressed by the extent and apparent success of no-fault compensation in relation to animals in New Zealand and Ontario. The Ontario scheme in particular illustrates well how provision for a specific category of limited risk can be incorporated into local administrative organisation. On the statistics available to us, it is clear that livestock-worrying by dogs is a considerable problem in this country. It is equally clear that it is difficult to find an entirely satisfactory solution for this problem merely by clarifying and modifying existing rules, although that is undoubtedly worth doing in itself. In these circumstances it may be that no-fault compensation at least for dogs injuring or killing livestock should be considered, particularly in light of the developments in relation to the registration of dogs already referred to.[2] However, we make no specific recommendations with regard to this matter, since we recognise that there are policy considerations involved which central and local authorities are better placed to assess than we are. However, we would urge that these issues should be considered in the light of our proposals in this Report.

[1]Communication from the Ontario Law Reform Commission.
[2]Para. 5.7.

PART VI SUMMARY OF RECOMMENDATIONS

Basis of liability

1. Fault, in its present form, should remain a ground of liability for animals, subject to exceptional provision for recognised special risks. There should be no reversal of the burden of proof, either generally or exceptionally.

(Paragraphs 3.6–3.14)

2. Strict liability, in an appropriate form, should be imposed in respect of such special risks as are recognised.

(Paragraphs 3.6–3.14)

Special risks

3. The risk that dogs may attack and injure persons or animals should be recognised as a special risk for which strict liability, in an appropriate form, should be imposed.

(Paragraphs 3.16–3.18)

4. The risk that livestock may stray in the course of foraging and cause damage to land, or the produce of land, or to other property on land, such as fences or buildings, should be recognised as a special risk for which strict liability, in an appropriate form, should be imposed.

(Paragraphs 3.19–3.24)

5. The risk that dangerous wild animals, as defined in the Dangerous Wild Animals Act 1976, may attack and injure persons or animals should be recognised as a special risk for which strict liability, in an appropriate form, should be imposed.

(Paragraphs 3.25–3.28)

6. No exceptional provision should be made by way of imposing strict liability for an individual animal which is known to its keeper to have dangerous or harmful propensities, and liability in this case should rest on fault.

(Paragraphs 3.33–3.37)

New rule of strict liability for special risks

7. Strict liability should be imposed for injury or damage caused by an animal if—
   (a) it belongs to a species whose members in general (if not controlled) are likely to cause severe injury to persons or animals (or death) or material damage to property by virtue of their physical attributes or habits; and
   (b) the injury or damage complained of is directly referable to these attributes or habits.

(Paragraphs 4.2–4.4; clauses 1(1), (4), (5), 7)

8. For the purpose of applying the new rule of strict liability—
   (a) dogs and dangerous wild animals (as defined) should be deemed to be likely to cause severe injury (or death) by attacking persons or animals; and

(b) livestock (the varieties listed) in the course of foraging should be deemed to be likely to cause material damage to land, the produce of land or other inanimate property on land.

(Paragraph 4.5; clauses 1(3), 7)

9. "Species", as used in the statement of the new rule of strict liability, should include any form or variety of a species, and any sub-division of a species identifiable by age, sex or other criteria relevant to the behaviour of animals.

(Paragraphs 4.6–4.7; clause 1(2))

Defences

10. Contributory negligence, whether partial or amounting to sole fault, and voluntary assumption of risk should be available in their present form as defences to liability under the new rule of strict liability.

(Paragraph 4.14; clauses 1(6), 2(1)*(a)*, *(b)*, (3)*(a)*)

11. It should not be a defence to liability under the new rule of strict liability that the injury or damage complained of was due to—

(a) unavoidable accident, more usually referred to as *damnum fatale, vis major* or act of God; or

(b) intervention of a third party;

nor should it be a defence—

(c) that the animal which caused the injury or damage had reverted to the wild state, having been abandoned by its former keeper, or having escaped.

(Paragraphs 4.15–4.16; clause 5(2)*(b)*)

12. It should be a defence to liability under the new rule of strict liability that injury or damage sustained by a person or animal was sustained while trespassing, but only if the animal causing the injury or damage *(a)* was not itself trespassing, and *(b)* was not kept to protect persons or property, or was so kept in circumstances such that the keeping of it for that purpose was reasonable, with due regard to the Guard Dogs Act 1975, where appropriate.

(Paragraphs 4.17–4.18; clauses 2(1)*(c)*, (2), (3)*(b)*)

Persons liable

13. Liability under the new rule of strict liability, where an animal causes injury or damage, should be imposed jointly and severally on the owner of the animal and on any other person having possession of it, and, if a child under 16 is the owner of the animal or has possession of it, on any person having actual care and control of the child, as well as on the child himself.

(Paragraphs 4.19–4.22; clause 5(1))

14. Liability under the new rule of strict liability should not be imposed on a person who has possession of an animal by reason only of the fact that he has detained it temporarily for the purpose of protecting it, or any other animal, or any person, or of preventing damage, or of returning it as soon as is reasonably practicable to its owner or a rightful possessor of it.

(Paragraphs 4.19, 4.22; clause 5(2)*(a)*)

15. Section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 should apply to actions based on the new rule of strict liability as it applies to actions based on fault.

(Paragraphs 4.20, 4.22; clause 1(7))

Strict liability for individual animals known to have dangerous or harmful propensities

16. Without prejudice to Recommendation 6, if a rule is required imposing strict liability for an individual animal which is known to its keeper to have dangerous or harmful propensities, this should be in the following form, and should be inserted appropriately into clause 1(1) of the Bill set out in Appendix A:

"1(1) Subject to subsections (4) and (5) below and section 2 of this Act, a keeper of an animal shall be liable for any injury or damage caused by it if—

(b) the animal—

(ii) is known to the keeper to be likely (unless controlled or restrained) by virtue of its physical attributes or habits,

to injure severely or kill persons or animals, or animals, or damage property to a material extent."

(Paragraphs 4.24–4.26; clause 1(1)*(b)*(ii)—see note on clause 1(1))

Detention of straying animals

17. An occupier of land should be entitled to detain any animal straying on his land in order to prevent injury or damage by it.

(Paragraphs 4.27–4.31; clause 3(1))

18. Part VI of the Civic Government (Scotland) Act 1982 (lost and abandoned property) and section 4 of the Dogs Act 1906 (delivery of stray dogs to police) should apply, as appropriate, where an occupier of land detains a straying animal to prevent injury or damage.

(Paragraphs 4.27–4.31; clause 3(2))

Preventive action against animals

19. It should be a defence to a claim for damages in respect of killing or injuring an animal that the death or injury was the result of preventive action to protect a person or animal (domestic or captive non-domestic) in the reasonable belief that the measures taken were the only practicable means of preventing injury in the circumstances.

(Paragraphs 4.32–4.40; clauses 4, 8(2), Schedule)

20. The defence to a claim for damages in respect of killing or injuring an animal, that the death or injury was the result of preventive action to protect a person or animal (domestic or captive non-domestic), should be subject to the following conditions:

(a) the defence should not be excluded by reason only that the owner or a person in charge of the animal killed or injured was present when the animal was killed or injured;

(b) the defence should be permitted where an animal which has been previously attacking persons or animals (domestic or captive non-domestic) remains in the vicinity where the attack took place and is not under the control of any person (whether or not it is threatening an attack), provided only that action is taken to prevent a further attack and is not merely punitive; there should be no requirement to consider the practicability of ascertaining who owns or has charge of the animal in question before taking action;

(c) the defence should not be excluded where action is taken to protect "trespassers", but should be excluded where the person taking preventive action is where he is for the purpose of engaging in some criminal activity and the action taken is in furtherance of that activity.

(Paragraphs 4.32–4.40; clause 4(2), (4))

APPENDIX A

ANIMALS (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

BILL

TO

Make provision for Scotland with respect to civil liability for injury or damage caused by animals, the detention of straying animals and the protection of persons or livestock from animals; and for connected purposes. A.D. 1985

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

New provisions as to strict liability for injury or damage caused by animals.

1.—(1) Subject to subsections (4) and (5) below and section 2 of this Act, a person shall be liable for any injury or damage caused by an animal if—

(*a*) at the time of the injury or damage complained of, he was a keeper of the animal;

(*b*) the animal belongs to a species whose members generally are by virtue of their physical attributes or habits likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent; and

(*c*) the injury or damage complained of is directly referable to such physical attributes or habits.

(2) A "species" includes—

(*a*) in paragraph (*b*) of subsection (1) above, a form or variety of the species or a sub-division of the species, or the form or variety, identifiable by age, sex or such other criteria as are relevant to the behaviour of animals; and

(*b*) both in that paragraph and in the definition of "species" contained in paragraph (*a*) above, a kind which is the product of hybridisation.

(3) For the purposes of subsection (1)(*b*) above—

(*a*) dogs, and dangerous wild animals within the meaning of section 7(4) of the Dangerous Wild Animals Act 1976, shall be deemed to be likely (unless controlled or restrained) to injure severely or kill persons or animals by biting or otherwise savaging, attacking or harrying; and

1976 c.38

Clause 1 implements the general policy of the Report that fault should remain a ground of liability for animals, subject to exceptional provision for recognised special risks for which strict liability in appropriate form should be imposed. See Recommendations 1 and 2.

Subsection (1) implements Recommendation 7. It introduces the new general rule of strict liability for species of animals whose members, generally, have physical attributes or habits by virtue of which they are likely to cause severe injury to persons or animals (or death), or material damage to property. It is not required that the actual injury or damage complained of should be serious in itself. See discussion in paragraphs 3.29–3.32 and 4.2–4.8. Paragraph (*a*) makes it clear that liability is imposed on whoever is a keeper of the animal causing the injury or damage complained of at the time when the injury or damage is caused.

"Animal" is defined in clause 7; "injury" also in clause 7, but subject to clause 1(4); "keeper" in clause 5; and "species" in clause 1(2).

Unlike the *scienter* rule of the present law, the subsection does not provide as such for strict liability in relation to an animal which is known to its keeper from its past behaviour to have dangerous or harmful propensities. The intention is that the *scienter* rule should be abolished and that liability in the circumstances posited should rest on fault. See Recommendation 6 and discussion in paragraphs 3.33–3.37 and clause 1(8)(*a*). However, if Recommendation 6 is not accepted, and a rule of strict liability is required for the individual animal of known dangerous or harmful propensities, that rule should take the form proposed in Recommendation 16. See discussion in paragraphs 4.24–4.26. Subsection 1(1)(*b*) would then read:

"(1) Subject to subsections (4) and (5) below and section 2 of this Act, a keeper of an animal shall be liable for any injury or damage caused by it if—

(*b*) the animal—

(i) belongs to a species whose members generally are by virtue of their physical attributes or habits likely (unless controlled or restrained), or

(ii) is known to the keeper to be likely (unless controlled or restrained) by virtue of its physical attributes or habits,

to injure severely or kill persons or animals or destroy or damage property to a material extent;".

Subsection (2), defining "species", implements Recommendation 9. The effect of paragraph (*a*) is that a claimant, if appropriate, can relate the physical attributes or habits of the animal in question to any distinct form or variety of a species, or to any sub-division of a species, or form or variety of a species, identifiable by criteria which are relevant to the behaviour of animals. For example, it might be possible to establish a relevant sub-division, in any given case, of males as against females, or of mature as against immature animals, or of females with young as against females without, and so on. See discussion in paragraphs 4.7 and 4.8.

Paragraph (*b*) ensures that subsection (1) applies to hybrid animals, that is, the off-spring of different species. Hybrids which are infertile or genetically unstable are apparently not classified scientifically as species. It is allowed that hybrid kinds, like species, may fall into distinct forms or varieties, or into sub-divisions of kinds, or forms or varieties of kinds, identifiable by criteria relevant to the behaviour of animals. See discussion in paragraph 4.12.

Subsection (3) implements Recommendation 8, which in turn rests on Recommendations 3, 4 and 5. Its effect is that if the specified animals can be shown to have caused injury (or death) or damage which is directly referable to the behaviour mentioned, then subsection (1) immediately applies. It is left to the discretion of the court to determine from case to case whether or not the specified animals may otherwise fall under subsection (1) by virtue of relevant physical attributes or habits other than those mentioned. See discussion in paragraphs 3.16–3.18, 3.19–3.24, 3.25–3.28 and 4.5–4.8.

(*b*) any of the following animals in the course of foraging, namely—

cattle, horses, asses, mules, hinnies, sheep, pigs, goats and deer,

shall be deemed to be likely (unless controlled or restrained) to damage to a material extent land or the produce of land, whether harvested or not.

(4) Subsection (1) above shall not apply to any injury caused by an animal where the injury consists of disease transmitted by means which are unlikely to cause severe injury other than disease.

(5) Subsection (1) above shall not apply to injury or damage caused by the mere fact that an animal is present on a road or in any other place.

1945 c.28

(6) For the purposes of the Law Reform (Contributory Negligence) Act 1945, any injury or damage for which a person is liable under this section shall be treated as due to his fault as defined in that Act.

1940 c.42

(7) Subsections (1) and (2) of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (contribution among joint wrongdoers) shall, subject to any necessary modifications, apply in relation to an action of damages in respect of injury or damage which is brought in pursuance of this section as they apply in relation to an action of damages in respect of loss or damage arising from any wrongful acts or omissions; but nothing in this subsection shall affect any contractual, or (except as aforesaid) any other, right of relief or indemnity.

(8) The foregoing provisions of this section and section 2 of this Act replace—

(*a*) any rule of law which imposes liability, without proof of a negligent act or omission, on the owner or possessor of an animal for injury or damage caused by that animal on the ground that the animal is *ferae naturae* or is otherwise known to be dangerous or harmful;

1686 c.21

(*b*) the Winter Herding Act 1686;

1906 c.32

(*c*) section 1(1) and (2) of the Dogs Act 1906 (injury to cattle or poultry).

"Harrying" is defined in clause 7. For the meaning of "land" see Schedule 1 of the Interpretation Act 1978.

Subsection (4), as read with clause 7, provides for the case where the injury inflicted is disease. Its effect is to exclude a claim under subsection (1) where the injury complained of consists only of disease (or its consequences) transmitted by means which are not likely to cause severe injury other than disease. That is, for example, if an animal merely by approaching or nuzzling another animal infects it, there will be no liability under subsection (1), although there may be liability based on fault, depending on the circumstances (clause 1(8)(*a*)). On the other hand, if a dog, say, attacks a sheep and bites it, and disease results which is directly referable to the biting, then there will be liability under subsection (1). See the definition of injury in clause 7.

Subsection (5) is intended to make it clear that strict liability under subsection (1) requires more than the mere passive presence of an animal. It reflects, in particular, the policy adopted in relation to livestock straying on public roads, that liability in these circumstances should continue to rest on fault. See clause 1(8)(*a*) and discussion in paragraphs 3.20–3.22, 3.24 and 4.11. However, it is expressed in this wider form since the principle involved is of general application.

Subsection (6), as read with clause 2(1)(*a*), partially implements Recommendation 10. It ensures that where a defence can be made out that the injury or damage complained of was partly due to the fault of the claimant, in effect a defence of contributory negligence, then, any damages awarded can be reduced equitably under the Law Reform (Contributory Negligence) Act 1945.

Subsection (7) implements Recommendation 15. By applying the relevant provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, it allows for an action for contribution or for third-party procedure in which the court can apportion damages between joint defenders in equitable proportions, if it sees fit. See discussion in paragraph 4.20.

Subsection (8), as read with clause 8(2) and the Schedule, abolishes the specified existing rules of strict liability for animals and replaces them with the new rule of strict liability formulated in the preceding subsections of this clause. It is so expressed that the ordinary principles of fault are left unaffected and will continue to apply to injury or damage caused by animals, as required by Recommendation 1.

Exceptions from liability under s.1.

2.—(1) A person shall not be liable under section 1(1) of this Act if—

(*a*) the injury or damage was due wholly to the fault of—

(i) the person sustaining it; or

(ii) in the case of injury sustained by an animal, a keeper of the animal;

(*b*) the person sustaining the injury or damage or a keeper of the animal sustaining the injury willingly accepted the risk of it as his; or

(*c*) subject to subsection (2) below—

(i) the injury or damage was sustained on, or in consequence of the person or animal sustaining the injury or damage coming on to, land which was occupied by a person who was a keeper, or by another person who authorised the presence on the land, of the animal which caused the injury or damage; and, (as the case may be), either

(ii) the person sustaining the injury or damage was not authorised or entitled to be on that land; or

(iii) no keeper of the animal sustaining the injury was authorised or entitled to have the animal present on that land.

(2) A person shall not be exempt from liability by virtue of subsection (1)(*c*) above if the animal causing the injury or damage was kept on the land wholly or partly for the purpose of protecting persons or property, unless the keeping of the animal there, and the use made of the animal, for that purpose was reasonable, and, if the animal was a guard dog within the meaning of the Guard Dogs Act 1975, unless there was compliance with section 1 of that Act.

1975 c.50

(3) In subsection (1) above—

1945 c.28

(*a*) in paragraph (*a*) "fault" has the same meaning as in the Law Reform (Contributory Negligence) Act 1945;

(*b*) in paragraph (*c*) "authorised" means expressly or impliedly authorised.

Detention of straying animals. 1984 c.54

3.—(1) Without prejudice to section 98 of the Roads (Scotland) Act 1984, where an animal strays on to any land and is not then under the control of any person, the occupier of the land may detain the animal for the purpose of preventing injury or damage by it.

Clause 2, as read with clause 5(2)*(b)*, implements Recommendations 10, 11 and 12. It provides for certain defences, or exceptions from liability, under clause 1. Recommendation 11, which rejects certain defences, does not require legislation, except as noted in relation to clause 5(2)(*b*). See discussion in paragraphs 4.15–4.16.

Subsection (1) implements Recommendations 10 and 12.

Paragraph (*a*), as read with subsection (3)(*a*) and clause 1(6), implements the first part of Recommendation 10. It provides, in effect, for a defence of contributory negligence. See discussion in paragraph 4.14.

Paragraph (*b*) implements the second part of Recommendation 10. It provides for a defence of voluntary assumption of risk, modelled on section 2(3) of the Occupiers' Liability (Scotland) Act 1960.

Paragraph (*c*), as read with subsections (2) and (3)(*b*), implements Recommendation 12. It provides for a qualified defence where an animal on its own territory, as it were, injures persons or animals coming on to the land where their presence is not authorised. "Authorised" is defined in subsection (3)(*b*). The existence of this defence, or exception, does not exclude the possibility of separately raising an action founded on fault, since the new rule of strict liability formulated in clause 1 does not affect the ordinary principles of fault under the present law. See clause 1(8) and discussion in paragraphs 4.17–4.18.

Subsection (2) qualifies the defence, or exception, provided for in subsection (1)(*c*). See discussion in paragraph 4.18.

Subsection (3), paragraph (*a*) is ancillary to subsection (1)(*a*). It defines "fault" for the purpose of establishing the exception, or defence of contributory negligence, created by that provision, as read with clause 1(6).

Paragraph (*b*) is ancillary to subsection (1)(*c*). It defines "authorised" for the purposes of that provision.

Clause 3 implements Recommendations 17 and 18.

Subsection (1) implements Recommendation 17. It permits the occupier of land to detain any animal which strays on to his land, but only for the purpose of preventing injury or damage by it. See discussion in paragraphs 4.27–4.30. If a detained animal causes injury or damage while it is detained, the person detaining it is not to be liable under clause 1 by reason only of his detention of the animal. However, prolonged detention, or change in the circumstances of the detention, may have that result if the court sees fit. See Recommendation 14 and clause 5(2)(*a*) and discussion in paragraph 4.19.

1982 c.45

(2) Part VI of the Civic Government (Scotland) Act 1982 (lost and abandoned property) shall apply in relation to an animal, other than a stray dog, detained under subsection (1) above as it applies in relation to any property taken possession of under section 67 of that Act subject to the omission from section 74 of the words from "or livestock" to "129 of this Act" and to any other necessary modifications; and section 4 of the Dogs Act 1906 shall, subject to any necessary modifications, apply to a stray dog detained under subsection (1) above as it applies to a stray dog taken possession of under that section.

1906 c.32

Killing of, or injury to, animals attacking or harrying persons or livestock.

4.—(1) Subject to subsection (2) below, in any civil proceedings against a person for killing or causing injury to an animal, it shall be a defence for him to prove—

(*a*) that he acted—

(i) in self defence;

(ii) for the protection of any other person; or

(iii) for the protection of any livestock and was one of the persons mentioned in subsection (3) below, and

(*b*) that within 48 hours after the killing or injury notice thereof was given by him or on his behalf at a police station or to a constable.

(2) There shall be no defence available under subsection (1) above to a person killing or causing injury to an animal where the killing or injury—

(*a*) occurred at or near a place where the person was present for the purpose of engaging in a criminal activity; and

(*b*) was in furtherance of that activity.

(3) The persons referred to in subsection (1)(*a*)(iii) above are—

(*a*) a person who, at the time of the injury or killing complained of, was a keeper of the livestock concerned;

(*b*) the owner or occupier of the land where the livestock was present; and

(*c*) a person authorised (either expressly or impliedly) to act for the protection of the livestock by such a keeper of the livestock or by the owner or occupier of the land where the livestock was present.

(4) A person killing or causing injury to an animal ("the defender") shall be regarded, for the purposes of this section, as acting in self-defence or for the protection of another person or any livestock if, and only if—

(*a*) the animal is attacking him or that other person or that livestock and (whether or not the animal is under the

Subsection (2) implements Recommendation 18. It provides for the disposal of animals detained under subsection (1) by applying in relation to such animals, as appropriate, Part VI of the Civic Government (Scotland) Act 1982 (lost and abandoned property) and section 4 of the Dogs Act 1906 (delivery of stray dogs to police).

Clause 4, as read with clause 8(2) and the Schedule, implements Recommendations 19 and 20. It replaces section 129 of the Civic Government (Scotland) Act 1982. See discussion in paragraphs 4.32–4.40.

Subsection (1), paragraph (*a*) provides that it shall be a defence in civil proceedings against a person for killing or injuring any animal that he acted in self-defence or for the protection of any other person, or, if he is such a person as is mentioned in subsection (3), for the protection of livestock. "Livestock" is widely defined in subsection (6) to include not only common farm animals such as sheep and cattle, but also all other domestic animals, as well as all non-domestic animals while in captivity.

Paragraph (*b*) makes it a condition of pleading the defence that notice of the action taken should be given to the police within 48 hours after the event.

Subsection (2) implements Recommendation 20(*c*). It excludes the defence provided where the person killing or injuring the animal did so while engaged in criminal activity and for the purpose of furthering that activity. The provision is perhaps unlikely to be invoked frequently in light of subsection (1)(*b*).

Subsection (3) defines the persons who may plead the defence under subsection 1(*a*)(iii), that they acted for the protection of livestock, as defined in subsection (6).

Subsection (4), as read with subsection (5), establishes certain conditions which must be satisfied by anyone pleading the defence.

Three cases are distinguished: first, in paragraph (*a*), the case where the animal is killed or injured while actually engaged in an attack (defined in subsection (5)); second, in paragraph (*b*)(i), the case where it is killed or injured when about to engage in an attack; and, third, in paragraph (*b*)(ii), the case where it has been engaged in an attack, not necessarily on the persons or livestock requiring protection, and is killed or

control of anyone) the defender has reasonable grounds for believing that there are no other practicable means of ending the attack; or

(*b*) the defender has reasonable grounds for believing—

(i) that the animal is about to attack him, such person or livestock and that (whether or not the animal is under the control of anyone) there are no other practicable means of preventing the attack; or

(ii) that the animal has been attacking a person or livestock, is not under the control of anyone and has not left the vicinity where the attack took place, and that there are no other practicable means of preventing a further attack by the animal while it is still in that vicinity.

(5) In subsection (4) above "attack" or "attacking" includes "harry" or "harrying".

(6) In this section—

"livestock" means any animals of a domestic variety (including, in particular sheep, cattle and horses) and, while they are in captivity, any other animals.

Meaning of a keeper of an animal.

5.—(1) Subject to subsection (2) below, for the purposes of this Act a person is a keeper of an animal if—

(*a*) he owns the animal or has possession of it; or

(*b*) he has actual care and control of a child under the age of 16 who owns the animal or has possession of it.

(2) For the purposes of this section—

(*a*) a person shall not be regarded as having possession of an animal by reason only that he is detaining it under section 3 of this Act or is otherwise temporarily detaining it for the purpose of protecting it or any person or other animal or of restoring it as soon as is reasonably practicable to its owner or a possessor of it;

(*b*) if an animal has been abandoned or has escaped, a person who at the time of the abandonment or escape was the owner of it or had it in his possession shall remain its owner or shall be regarded as continuing to have possession of it until another person acquires its ownership or (as the case may be) comes into possession of it; and

(*c*) the Crown shall not acquire ownership of an animal on its abandonment.

injured while it remains in the vicinity of the previous attack, and is not under control. In every case there must be reasonable grounds for believing that the action taken is the only practicable means available to end or prevent an attack. See, in particular, paragraph (*b*)(ii) and Recommendation 20(*b*).

For the purpose of paragraphs (*a*) and (*b*)(i), the presence or absence of someone in charge of the animal in question is not conclusive, but only one factor to be taken into account. See Recommendation 20(*a*) and discussion in paragraphs 4.35 and 4.37.

Subsection (5) defines "attack" for the purposes of subsection (4). "Harry" is defined in clause 7.

Subsection (6) defines "livestock" for the purposes of the clause. See discussion in paragraph 4.36.

Clause 5 implements Recommendations 13 and 14.

Subsection (1) implements Recommendation 13. Its effect, as read with clause 1, is that where an animal causes relevant injury or damage, joint and several liability is imposed on anyone then owning it or having possession of it; and, if a child under 16 owns it or has possession of it, also on anyone having actual care and control of the child, as well as on the child himself.

Subsection (2), paragraph (*a*) has the effect of exempting from liability anyone who has possession of an animal only because he has detained it temporarily in the circumstances or for the purposes mentioned. It is left to the discretion of the court to determine when temporary detention might become possession for the purposes of imposing liability for an animal which has caused injury or damage while being detained. See discussion in paragraph 4.19.

Paragraph (*b*) ensures that once an animal has been owned or has come into someone's possession, otherwise than by way of temporary detention as mentioned in paragraph (*a*), then it will always have a keeper who will be liable if it causes relevant injury or damage. This has the effect of excluding any defence that an animal which has caused injury or damage after being abandoned, or having escaped, has reverted to the wild state and, as such, has no keeper on whom liability may be imposed. See Recommendation 11 and discussion in paragraphs 4.13 and 4.15.

Paragraph (*c*) takes account of the common law doctrine that abandoned property vests in the Crown. The provision has the effect of exempting the Crown from liability under clause 1 in relation to abandoned animals. This does not affect possession taken by the Crown in the ordinary way or other modes by which the Crown may acquire ownership. Except in the case expressly excluded, the Crown might be liable as keeper like any other person, subject to the usual exemption for Her Majesty in her private capacity. See clause 6.

Application to Crown.

6.—This Act binds the Crown, but this section shall not authorise proceedings to be brought against Her Majesty in her private capacity.

Interpretation

7.—in this Act, unless the context otherwise requires—

"animal" does not include viruses, bacteria, algae, fungi or protozoa;

"harry" includes chase in such a way as may be likely to cause injury or suffering; and "harrying" shall be construed accordingly;

"injury" includes death, any abortion or other impairment of physical or mental condition and any loss of or diminution in the produce of an animal and, subject to section 1(4) of this Act, disease.

Transitional provision and repeals.

8.—(1) This Act shall apply only in relation to injury or damage caused after the commencement of the Act.

(2) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title, commencement and extent.

9.—(1) This Act may be cited as the Animals (Scotland) Act 1985.

(2) This Act shall come into force at the end of a period of 2 months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

Section 8(2)

SCHEDULE

ENACTMENTS REPEALED

Chapter	Short title	Extent of repeal
1686 c.21	The Winter Herding Act 1686	The whole Act.
6 Edw. 7 c.32	The Dogs Act 1906	In section 1, subsections (1) to (3).
18 and 19 Geo. 5 c.21	The Dogs (Amendment) Act 1928	In section 1(1) the words "in both places where that word occurs".
1982 c.45	The Civic Government (Scotland) Act 1982	Section 129.

APPENDIX B

List of those who submitted written comments on Consultative Memorandum No. 55 or associated Pamphlet

Annandale and Eskdale District Council
Argyll and Bute District Council
Association of Circus Proprietors of Great Britain
Badenoch and Strathspey District Council
Blackface Sheep Breeders' Association
British Deer Society
British Goat Society
British Horse Society
British Insurance Association
British Small Animals Veterinary Association—Scottish Region
British Veterinary Association—Scottish Branch
D. Brown, Tarbet
Major W. Brown, Newtown St. Boswells
The Lord Burton
Dr. D. L. Carey Miller, University of Aberdeen
B. G. Carnegie, Kirriemuir
Carrutherstown Community Council
Dr. A. S. Chamove, University of Stirling
M. Connarty, Stirling District Council
Convention of Scottish Local Authorities
Countryside Commission for Scotland
Crofters Commission
Cumnock and Doon Valley District Council
Dr. C. G. Dacke, University of Aberdeen
G. B. Dallas, Tain
G. S. Dann, Edinburgh
Mrs. N. Davidson, Stonehaven
J. N. Douglas-Menzies, F.R.I.C.S., South Queensferry
Dumfries and Galloway Constabulary
Faculty of Law, University of Aberdeen
G. Flitcroft, Annandale and Eskdale District Council
Forestry Commission
Game Conservancy
Mrs. M. R. Govan, Edinburgh
Gretna Community Council
H. McN. Henderson, University of Edinburgh
J. D. F. Henderson, East Linton
Inverness District Council
Junior Chamber Scotland
J. T. Kelman, F.R.I.C.S., Aberdeen
Land O'Burns Canine Club
Law Society of Scotland
League for the Introduction of Canine Control
Mrs. J. Mackenzie, Fort Augustus
Sheriff J. McInnes, Cupar
G. McNicol, Solicitor, Arbroath

Mrs. G. Nalbandova, Dunbar
National Farmers' Union—Cumbria County Branch
National Farmers' Union Mutual Insurance Society Limited
National Farmers' Union—North Riding and Durham County Branch
National Farmers' Union of Scotland
Northern Constabulary
Professor C. I. Phillips, University of Edinburgh
J. T. Porter, Solicitor, Newtown St. Boswells
S. Reid, M.B.I.M., M.I.L.G.A., M.R.A.M., Ainst.P.R.A., M.I.R.M., Arbroath
Ross and Cromarty District Council
Royal Burgh of Lochmaben and District Community Council
W. A. Rutherford, Annandale and Eskdale District Council
Scottish Branch of the Royal Institution of Chartered Surveyors—Land Agency and Agricultural Division
Scottish Canine Consultative Council
Scottish Landowners' Federation
Scottish Law Agents Society
Sheriffs' Association
Solicitor's Office (Scottish Office)
St. Andrew Animal Fund
A. W. B. Watt, Aberdeen
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